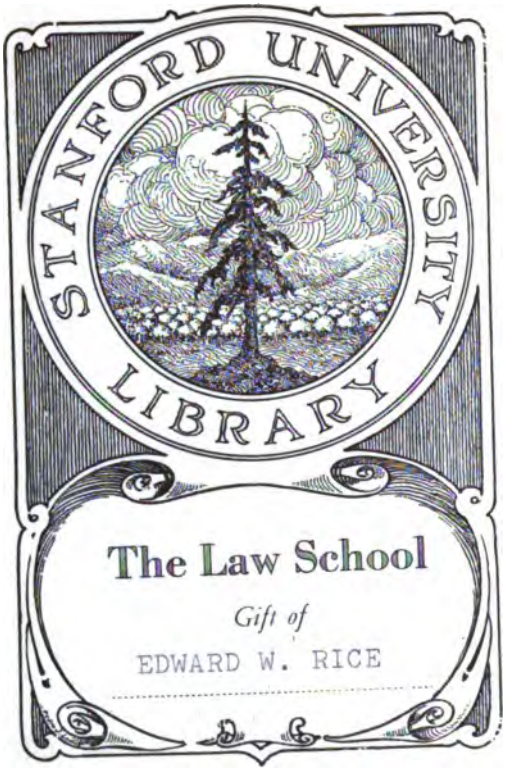
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MARSDEN'S

COLLISIONS AT SEA.

THIRD EDITION.

A TREATISE ON

THE LAW OF

COLLISIONS AT SEA,

WITH

An Appendix,

CONTAINING THE

INTERNATIONAL REGULATIONS FOR PREVENTING COLLISIONS AT SEA, AND LOCAL RULES FOR THE SAME PURPOSE IN FORCE IN THE THAMES, MERSEY, AND ELSEWHERE,

ALSO THE

REGULATIONS APPROVED AT THE WASHINGTON INTERNATIONAL MARITIME CONFERENCE.

THIRD EDITION

BY

REGINALD G. MARSDEN,

OF THE INNER TEMPLE, BARRISTER-AT-LAW,

ASSISTED BY

THE HON. JOHN MANSFIELD,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

"Si navis tua impacta in meam scapham damnum mihi dederit quæsitum est quæ actio mihi competeret."—Dig. lib. ix., tit. ii., fr. 29, § 2.

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PREFACE.

In the present Edition Chapters III., IV., and V. of the second edition have been sub-divided; the cases upon Practice are collected in Chapter XII.; those upon Costs follow in Chapter XIII. Additional matter representing the decisions of the past five years has been embodied, mainly in Chapters XII. and XIV. The history of the rule as to division of loss has been removed from its former place in the text to the foot (Note 1) of Chapter VI.

To the Appendix have been added the Regulations approved by the representatives of the maritime nations at the Conference held at Washington in 1889—1890. It is anticipated that this Code will, possibly with some modifications, supersede the Regulations (of 1884) now in force. But some time must elapse before the change in the law is effected, and it has been thought best not to further delay the publication of the present edition. The attention of the reader is called to

some of the points in which the Washington Regulations differ from the existing Regulations, by the footnotes referring to the new Code in the Appendix.

Upon a former occasion I ventured to remark upon the growing complexity of the Regulations. Since that date (1885) the alterations and proposed alterations in the law have been in the direction, not of simplification, but further complexity. It seems almost too much to expect a North Sea smacksman to apply with success such a law as Article 10 of the Regulations of 1884, as altered by Order in Council, and explained by *The Tweedsdale.*

R. G. M.

INNER TEMPLE,
13*th February*, 1891.

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THE LAW

OF

COLLISIONS AT SEA.

CHAPTER I.

NEGLIGENCE.

Collision without negligence creates no liability.

THE mere fact that a ship strikes or goes foul of and injures another creates no liability in herself, her owners, or those in charge of her. The assertion that one ship "ran into" or "ran down" the other, often made in collision actions by witnesses on both sides, is a mere allegation of negligence, and in no way advances the case (*a*). So that damages may be recovered, negligence for which the owners or persons in charge of the ship sued are responsible must be proved. There is one case, but one case only, in which damages may be recovered without proof of negligence; the case, namely, of an infringement by the defendant ship of one of the Statutory Regulations for Preventing Collisions at Sea which might by possibility have contributed to the collision. Here a rule of law (*b*) requires that the ship which has broken the law shall be deemed to be in fault for the collision. It excludes evidence directed to show that the infringement did not in fact contribute to the collision, and renders the consideration

(*a*) *The James Watt*, 2 W. Rob. 270, 278.

(*b*) 35 & 36 Vict. c. 85, s. 17; see *infra*, pp. 38, *seq.*

of the question of actual negligence unnecessary. The precise effect of this important enactment will be considered hereafter (*c*).

Case of inscrutable fault.

Where a ship, or each of the two ships, alleges (*d*) negligence on the part of the other, and it is manifest that the collision was caused by fault somewhere, but the evidence does not satisfy the Court on which side the fault lies, no damages can be recovered, and each ship bears her own loss (*e*). The English law as to the incidence of loss in this case differs from that of some foreign countries, and also, it seems, from the general maritime law (*f*).

In *The Albert Edward* (*g*), an action against a steamship for damage to a mooring dolphin, which fell over on being struck or pressed upon by the ship, was dismissed with costs, on the ground that mere contact with the dolphin did not constitute a cause of action, and that the damage to the dolphin was the result of its own weakness, and was not caused by any negligence on the part of the ship.

What is negligence.

Negligence is the failure to exercise that skill care and nerve which are ordinarily to be found in a competent seaman. "We are not to expect extraordinary skill or

(*c*) *Infra*, pp. 38, *seq.*

(*d*) Following a practice which is almost universal, the writer here and subsequently personifies the ship. Convenience and habit will, perhaps, be considered a sufficient excuse for the use of a phraseology which has sometimes proved misleading; see *infra*, p. 75.

(*e*) *The Maid of Aukland*, 6 Not. of Cas. 240; *The Catherine of Dover*, 2 Hag. Ad. 145; *The Laconia*, 2 Moo. P. C. C. N. S. 161; Abbott on Shipping, 12th ed. 520; and see *per* Lord Wensleydale, *Morgan* v. *Sim*, *The London*, 11 Moo. P. C. C. 307, 312. But formerly the law was otherwise; see *infra*, p. 152.

(*f*) See Bell's Commentaries on the Law of Scotland (ed. 1870, by McLaren), I. 627; Bynkershoek, Quæst. Jur. Priv. C. 4, c. 18; Pothier, vol. 4, p. 444. There is no express authority for this statement as to the peculiarity of English law, and there are early decisions to the contrary; see *infra*, p. 145. But no case is to be found in the books in which damages have been recovered in a case of inscrutable fault, or in any case in which negligence has not been proved against the other ship. As to the Roman and foreign law on the point, see *infra*, p. 68, and the note at the foot of Chapter VI.

(*g*) 44 L. J. Ad. 49.

extraordinary diligence, but that degree of skill, and that degree of diligence, which is generally to be found in persons who discharge their duty" (*h*). In *The Dundee* (*i*) Lord Stowell defined negligence as "a want of that attention and vigilance which is due to the security of other vessels that are navigating the same seas, and which, if so far neglected as to become, however unintentionally, the cause of damage of any extent to such other vessels, the maritime law considers as a dereliction of bounden duty, entitling the sufferer to reparation in damages." In a recent case before the House of Lords, it was said that the duty of a seaman is "to take reasonable care and to use reasonable skill to prevent the ship from doing injury;" and it was pointed out that much more skill is reasonably required from a person who takes charge of a ship than from one who drives a carriage (*k*). So in the case of a collision between a ship being launched and another afloat, it was said by Butt, J., that under the circumstances the utmost possible precautions by those in charge of the launch were no more than reasonable (*l*).

A wrong step taken in the agony of the collision is not negligence.

If a vessel by her own fault makes a collision so imminent that it cannot be avoided except by the extraordinary skill nerve or exertion on the part of the other ship, and a collision occurs, it will be held to have been caused by the former, and she will be liable for the entire loss. In such a case, and in every case where a ship by her own negligence places another in sudden and great peril, the latter will not be held guilty of negligence because at the last moment she did something that contributed to the collision, or omitted to do something that might have avoided it (*m*).

(*h*) *Per* Dr. Lushington, *The Thomas Powell* and *The Cuba*, 2 Mar. Law Cas. O. S. 344.

(*i*) 1 Hag. Ad. 120.

(*k*) *Per* Lord Blackburn, *Stoomvaart Maatschappy Nederland* v. *Directors, &c. of the Peninsular and Oriental Steam Navigation Co., The Voorwaarts* and *The Khedive*, 5 App. Ca. 876, 890. This case is frequently cited in the following pages as *The Voorwaarts* and *The Khedive*. See also *infra*, p. 72.

(*l*) *The George Roper*, 49 L. T. N. S. 185; 8 P. D. 119.

(*m*) *The Nor*, 2 Asp. Mar. Law

And the same principle applies in all cases of sudden and great danger not caused by a man's own negligence. In such circumstances he is required to exhibit ordinary presence of mind and ordinary skill; but it is manifest that in such a case he may do, or omit to do, something which may contribute to the collision, without thereby showing himself deficient in ordinary skill, care, or nerve. Such an act of omission is held not to be negligence (*n*).

Except where there is a statutory presumption of fault.

It will, however, be seen hereafter that an arbitrary rule of law requires the courts to attribute fault to a ship that has, even under such circumstances of sudden and extraordinary peril, infringed one of the Statutory Regulations for preventing collisions that might by possibility have contributed to the collision, although those on board have not, in fact, been guilty of any negligent act or omission (*o*).

Examples.

The following cases illustrate the principle above mentioned, that a wrong step taken in the agony of the collision will not necessarily cause the ship to be held in fault for the collision.

A sailing ship (*p*) in a thick fog sighted another at so

Cas. 264; *The C. M. Palmer* and *The Larnax*, *infra*; *The Pyrus* and *The Smales*, Holt, 40; *The Elizabeth* and *The Lotus*, 2 Mar. Law Cas. O. S. 238; *The Sisters*, 1 P. D. 117; *The Bywell Castle*, 4 P. D. 219; *The William Frederick* and *The Byfoged Christensen*, 4 App. Cas. 669; *The Voorwaarts* and *The Khedive*, 5 App. Ca. 876. Cf. also *Clayards* v. *Dethick*, 12 Q. B. 439; and *per* Lord Ellenborough, C.J., in *Jones* v. *Boyce*, 1 Stark. 493, 495: "If I place a man in such a situation that he must adopt a perilous alternative (as jumping off a coach), I am responsible for the consequences." It has been often held by the Supreme Court of the United States that a vessel which by her own fault causes sudden peril to another cannot impute to the other as a fault a measure taken *in extremis*, although it was a wrong step, and but for it the collision would not have occurred. A mistake made in the agony of the collision is regarded as an error for which the vessel causing the peril is altogether responsible: *The Nichols*, 7 Wall. 656; *The Carroll*, 8 Wall. 302; *The City of Paris*, 9 Wall. 634; *The Lucile*, 15 Wall. 676; *The Favorita*, 18 Wall. 598; *The Falcon*, 19 Wall. 75; *The Sea Gull*, 23 Wall. 165. There are decisions of the French courts to the same effect: Abordage Nautique (Caumont), s.-s. 134.

(*n*) *The Sisters*, 1 P. D. 117; *The Jesmond* and *The Earl of Elgin*, L. R. 4 P. C. 1, 7; *The Marpesia*, L. R. 4 P. C. 212, *Vennall* v. *Garner*, 1 Cr. & M. 21; *The City of Antwerp* and *The Friedrich*, *Inman* v. *Reck*, L. R. 2 P. C. 25.

(*o*) *Infra*, p. 48.

(*p*) *The Marpesia*, L. R. 4 P. C. 212.

short a distance that in a minute, or less than a minute, the ships were in collision. Her helm was altered, but the head-sheets, which had just been let go, were not hauled aft, nor were the lee braces let go, so as to assist her head in paying off. It was held that, even if the collision could have been avoided by the measures suggested, the time was so short that there was no negligence in their omission.

Where a steamship coming up the Thames at night passed a schooner, and when about 300 yards a-head of her took the ground and stopped, the schooner was held not to be in fault for a collision which followed, although possibly, if she had at once let go her anchor, she might have prevented the collision (*q*).

A steamship bound down the river Thames on a very dark night was rounding-to in Gravesend Reach before coming to an anchor. While rounding-to she ran into and sank a vessel at anchor without a riding light up. The instant the latter vessel was seen the engines of the steamship were stopped and reversed, but her anchor was not let go. It was held that, even if the collision could have been averted by letting go the anchor, the master of the steamship was not guilty of negligence, because, at the moment, it did not occur to him to let go his anchor (*r*).

But if a ship seeks to excuse herself for taking a wrong step, which, in fact, caused or contributed to the collision, upon the ground of sudden peril, she must show clearly that she was in no way responsible for the sudden peril (*s*).

Misleading lights, hailing or other embarrassing acts.

Upon the same principle, if a ship by carrying wrong lights, or by navigating in an improper or unusual manner, misleads or embarrasses another, she cannot attribute as a fault to the latter any act which was the probable result of

(*q*) *The Elizabeth* and *The Adalia*, 3 Mar. Law Cas. O. S. 345.

(*r*) *The C. M. Palmer* and *The Larnax*, 2 Asp. Mar. Law Cas. 94.

(*s*) See *The Bywell Castle*, 4 P. D. 219, and the cases cited above. *The David Morris*, Brown, Ad. 273; *The Elizabeth Jenkins*, 5 Dav. 514

The Utopia 1893 A.C. 492

her own negligence (*t*). So where a ship is hailed from another to take a particular course, and she obeys the hail, the other ship cannot be heard to say that the course was wrong, although, in fact, it caused the collision and was in violation of the Regulations (*u*).

Both ships must comply with the Regulations.

Where there is risk of collision, and the Statutory Regulations for preventing collisions require both the ships to alter their courses, or to take other measures to avoid collision, it is negligence in either ship not to take the prescribed step. One of them cannot excuse herself for disobeying the law upon the ground that there would have been no collision if the other had obeyed the law. In such a case she would be prevented from recovering more than half her loss by 36 & 37 Vict. c. 85, s. 17 (*x*); and, independently of the statute, a vessel, which, by infringing the Regulations, or by negligence in any other respect, contributes to a collision, is clearly in fault (*y*). Failure to comply with the Regulations is always negligence, and, as will be seen below (*z*), it will in almost every case be held to be negligence contributing to the collision.

In ordinary cases no discretion as to complying with the Regulations.

It is sometimes contended on the part of a ship that has failed to comply with the Regulations, and is herself in fault, that the other ship is guilty of contributory negligence for not having departed from the Regulations (*a*).

(*t*) *The Rob Roy*, 3 W. Rob. 190; *The Scotia*, 14 Wall. 170; *The Mary Hounsell*, 4 P. D. 204; 40 L. T. N. S. 368.

(*u*) See *The Carolus Rotchers*, 3 Hag. Ad. 343, note. In this case a ship close-hauled on the starboard tack hailed another close-hauled on the port tack to keep her luff. The latter did so, and a collision occurred. The first ship was held in fault. It is submitted that notwithstanding 36 & 37 Vict. c. 85, s. 17, the rule would be the same at the present day. It would probably be held that, after such an intimation from the other ship of her intended course, a departure from the Regulations was necessary to avoid immediate danger (Art. 23). See also *Wilson* v. *Canada Shipping Co.*, 2 App. Ca. 389; *The Lake St. Clair* and *The Underwriter*, 3 App. M. L. C. 361; *The James Watt*, 2 W. Rob. 270; *The Independence*, 14 Moo. P. C. C. 103, 109; *The Huntress*, 2 Sprague, 61.

(*x*) See below, p. 38.

(*y*) See *The America*, 2 Otto, 432.

(*z*) *Infra*, pp. 42, *seq.*

(*a*) *The Byfoged Christensen*, 4 App. Ca. 669. In *The Tasmania* the

Such a contention will seldom succeed. It will be seen below (*b*) that a construction has been put upon 36 & 37 Vict. c. 85, s. 17, and Article 23 of the Regulations, which takes away all discretion from persons in charge of ships as to complying or not complying with a Regulation, where it is possible that the collision may be avoided by obeying it. In *The Benares* (*c*), it was held by the Court of Appeal that where by departing from the Regulations there is a chance of avoiding a collision that is otherwise inevitable, a vessel will not be held in fault for taking advantage of that chance; but, on the other hand, the circumstances must be very exceptional to make her guilty of contributory negligence if she elects to adhere to the Regulations.

Inevitable accident.

A collision which could not by any care or skill have been prevented is accurately described as an inevitable accident. But the term "inevitable accident" in Admiralty is commonly used in a wider sense to describe a collision which could not have been prevented by ordinary care, in other words, a collision which occurs without negligence in either ship. The phrase is not a happy one, for a collision which might have been avoided by the exercise of extraordinary skill and care, is not, in fact, inevitable. Its use, however, in the looser sense, is well established.

In *The Europa* (*d*), Dr. Lushington states that inevitable accident is "where one vessel doing a lawful act without any intention of harm, and using proper precautions, unfortunately happens to run into another vessel." Again, "to constitute inevitable accident, it is necessary that the occurrence should have taken place in such a manner as not to have been capable of being prevented by ordinary skill and ordinary prudence. We are not to

contention, which had not been raised before Butt, J., succeeded in the Court of Appeal, 14 P. D. 53; but the decision of that Court was in turn reversed by the House of Lords (15 Ap. Ca. 223). See also *The Highgate*, 62 L. T. N. S. 841.

(*b*) *Infra*, p. 48.

(*c*) 9 P. D. 16.

(*d*) 14 Jur. 627, 629.

expect extraordinary skill or extraordinary diligence, but that degree of skill and that degree of diligence which is generally to be found in persons who discharge their duty" (*d*). More recently, the Privy Council, adopting the language of Dr. Lushington, defined inevitable accident to be "that which a party charged with an offence could not possibly prevent by the exercise of ordinary care, caution, and maritime skill" (*e*).

A collision may be caused by negligence though inevitable for some time before it occurs.

From the above considerations it is evident that to sustain the plea of "inevitable accident" it is not enough to show merely that the collision was inevitable at the moment of, or even for some moments before, its occurrence (*f*). The weight of a ship and her momentum is so great that her rudder, and even her engines (in the case of a steamship) are frequently powerless to avert a collision for some time before the ships come together. It is not enough for a ship to show that, as soon as the necessity for taking measures to avoid collisions were perceived, all that could be done was done. The question remains whether precautions should not have been taken earlier. When two ships are shown to have been in a position in which a collision was inevitable, the question is, by whose fault, if there was fault, did the vessels get into such a position? (*g*). Thus, if a vessel is proceeding at too great a rate of speed she cannot be heard to allege "inevitable accident" (*h*).

Burden of proving inevitable accident.

Where a collision is the result of inevitable accident the burden of proving that it was so does not in the first

(*d*) *The Thomas Powell* and *The Cuba*, 2 Mar. Law Cas. O. S. 344. See also *The Plato* and *The Perseverance*, Holt, 262; and *The Maybey* and *The Cooper*, 14 Wall. 204, 215, for a similar statement by the Supreme Court of the United States.

(*e*) *Per* Sir J. Colville, *The Marpessia*, L. R. 4 P. C. 212, 220, citing from *The Virgil*, 2 W. Rob. 201. See also *The Lochibo*, 3 W. Rob. 310, 318.

(*f*) See *The Uhla*, 3 Mar. Law Cas. O. S. 148.

(*g*) See *The Independence*, *Maddox v. Fisher*, 14 Moo. P. C. C. 103, 109; *The Despatch*, *ibid.* 83; *The Pennsylvania*, 3 Mar. Law Cas. O. S. 477; *The America*, 2 Otto, 432.

(*h*) See *per* Dr. Lushington, *The Juliet Erskine*, 6 Not. of Cas. 633.

instance attach to the ship alleging it. But where a *primâ facie* case of negligence is made out, then it lies on the ship alleging inevitable accident to prove it (*i*).

Vessel infringing the Regulations cannot plead inevitable accident.

It seems that a vessel in default for not having lights, or for not complying with the Regulations, cannot, at least where such non-compliance by possibility might have contributed to the collision, successfully plead inevitable accident (*k*). But such a defence may be good where the circumstances of the case made a departure from the Regulations necessary, or where her inability to take the proper measures was caused by no fault of her own (*l*).

Collision inevitable so far as concerns the ship sued.

A collision may be an inevitable accident so far as the ship sued is concerned, although it was caused by fault elsewhere; as in the case of a ship which is thrown against another by the swell of a passing steamship, or by a third ship coming foul of her (*m*).

Disabled ship.

Where a ship is unable to take the proper measures to avoid a collision owing to her being disabled, or for some reason for which she is not responsible, it is the duty of the other ship to avoid her if she can. But a collision occurring in consequence of her disabled state will be held to be an inevitable accident, if the other vessel was ignorant of it, and was not in fault for not being aware of it, or for not keeping out of the way (*n*). *The Aimo*, close-hauled on the starboard tack, saw the red light of *The Amelia*, a vessel close-hauled on the port tack, a little on her port bow. *The Aimo* kept her course. *The Amelia*, having lost her head sails in a previous collision, was unable to bear up, and a collision occurred. It was held to be an inevitable accident (*o*).

(*i*) *The Bolina*, 3 Not. of Cas. 208; *The Marpesia*, L. R. 4 P. C. 212; and see *infra*, p. 30.

(*k*) 36 & 37 Vict. c. 85, s. 17; see *infra*, pp. 38, *seq.*

(*l*) See *infra*, pp. 50, 55.

(*m*) See 1 Parsons on Ship. (ed. 1869), 533; *The Sisters*, 1 P. D. 117; *The Hibernia*, 4 Jur. N. S. 1244; *The Macleod*, Stuart's V. Ad. Rep. (Canada) 140.

(*n*) *The John Buddle*, 5 Not. of Cas. 387.

(*o*) *The Aimo* and *The Amelia*, 2 Asp. Mar. Law Cas. 96; and see *The Venus*, 1 Pritch. Ad. Dig. 129. As to a vessel disabled by her own fault, see *infra*, p. 25.

Instances of inevitable accident.

In the following cases the courts have held that the collisions were the result of inevitable accident. It must, however, be pointed out again that the question before the Court in all these cases was, not whether the collision was inevitable, but whether it could have been avoided by ordinary care.

A steamer rounding-to in the Thames on a dark night against a strong flood tide under a starboard helm, with her head to the southward, was seen by a brig coming down. Notwithstanding that all that could be done was done by both vessels, a collision occurred. It was held to be a case of inevitable accident. The Court said that if the steamer had put her helm to starboard with a view to bring up after seeing the brig she would have been to blame (*p*).

The Balaklava 7 Dec 10 Ca 1889 15 PD 37. 62 LT 65.406.

A ship, which had made fast by order of the port authority to a private buoy, was held not to be in fault for a collision caused by the parting of the band round the buoy (*q*); and a collision caused by the parting of the band was held to be an inevitable accident.

In the absence of evidence of negligence on the part of the crew, the jamming of the cable round the windlass, when the anchor was let go, was held to be an inevitable accident (*r*).

The parting of a cable in a gale of wind (*s*), and of moorings in calm weather (*t*), has been held to be an inevitable accident. But if there is negligence in not letting go an anchor, or in not having an anchor ready to let go when the vessel is adrift, she cannot sustain the defence of inevitable accident (*u*).

(*p*) *The Shannon*, 1 W. Rob. 463.

(*q*) *The William Lindsay*, L. R. 5 P. C. 338.

(*r*) *The William Lindsay*, *supra*; *The Peerless*, Lush. 30. But see *The Agamemnon*, 1 Quebec, L. R. 333, as to windlass carrying away.

(*s*) *The London*, 1 Mar. Law Cas. O. S. 398; Br. & L. 82.

(*t*) *The Ambassador*, Ad. Ct., Feb. 12th, 1875, cited in *The Pladda*, 2 P. D. 34, 37.

(*u*) *The Pladda*, 2 P. D. 34; *The Kepler*, *ibid.* 40; *The City of Peking*, 14 Ap. Cas. 40 (chain cable not bent). As to such a plea by a ship

Where a collision occurred in consequence of the breaking of part of the steering gear, there being a latent defect in the metal, it was held to be an inevitable accident (*x*). But if the gear is manifestly insufficient or weak, the defence of inevitable accident cannot be sustained (*y*).

Where a ship, A., at anchor in the Thames, was run into by another, B., and was, without fault on her own part, driven by B. against a third ship, C., it was held that, so far as A. was concerned, the collision between her and C. was an inevitable accident (*z*).

A ship which had been ashore on a sand, was driving over it, and came into collision with another brought up in deep water to leeward of the sand. To have let go her anchor before she was clear of the sand would have been dangerous to herself, and without letting go while on the sand she could not keep clear of the ship at anchor. A collision which followed was held to be inevitable (*a*).

A dumb-barge in the Thames, driving with the tide, came into collision with a steamer going up against the ebb at the rate of two knots. There was evidence that the barge could not have been seen sooner than she was seen. In the absence of evidence of negligence on the part of the steamer, the collision was held to be an inevitable accident (*b*).

Where two ships, by no fault of their own, suddenly find themselves in a position in which a collision is imminent, and one of them omits to execute a manœuvre which possibly might have averted the collision, she will not necessarily be held in fault for not having taken the

which has given another a foul berth, see *The Secret*, 26 L. T. N. S. 670.

(*x*) *The Virgo*, 3 Asp. Mar. Law Cas. 285.

(*y*) *The M. M. Caleb*, 10 Blatchf. 467; *The Warkworth*, 9 P. D. 20, 145; *infra*, p. 176; *The Indus*, 12 P. D. 46. Both these last were cases of steam steering gear failing to act.

(*z*) *The Hibernia*, 4 Jur. N. S. 1244.

(*a*) *The Thornley*, 7 Jur. 659. *The Buckhurst*, 6 P. D. 152, is a very similar case.

(*b*) *The Swallow*, 3 Asp. Mar. Law Cas. 371.

The Merchant Prince
1892 P. 9. 179.
The Albano Mar. 92. Puig.

measure suggested. Where two large sailing-ships, one in the act of going about, and the other going free, sighted each other in a dense fog at a distance of less than 300 yards, and a collision occurred in less than a minute, it was held that the ship in stays was not in fault for not having hauled aft her head sheets to assist her helm, although if she had done so the collision might have been averted. The collision was held to be a case of inevitable accident (*c*).

In *The Resolution* (*d*), Sir J. Marriott held that a collision caused by "showring weather, the darkness of the night, and the small distance of the two ships and shortness of time in discovering each other, being close," was an inevitable accident. *Sed qu.*

American cases.

In the following American cases the defence of inevitable accident has been sustained.

A vessel in the open sea overtook another at night, the darkness being so great that she could not see the vessel ahead in time to avoid her (*e*). A sailing-ship in a narrow channel being suddenly compelled to let go her anchor to save herself from going ashore, in consequence of the wind failing, a steamship close astern unavoidably ran into her (*f*).

A large steamer was entering a harbour by a course that was not the usual one, but which was a course she had a right to go. As she was rounding the stern of a hulk, she suddenly saw and ran into a schooner which the hulk had prevented her seeing before. The schooner, which had just cast off from her tug, was setting her sails and drifting with the tide in a helpless condition. The collision was held by the Supreme Court to have been inevitable (*g*).

(*c*) *The Marpesia*, L. R. 4 P. C. 212.

(*d*) Marsd. Ad. Ca. 332; *infra*, p. 152.

(*e*) *The Morning Light*, 2 Wall. 550, 557.

(*f*) *The Electra*, 6 Bened. 189.

(*g*) *The Java*, 14 Wall. 189; *The Nova Scotia* and *The Quebec*, 1 Quebec, L. R. 1.

Cont. Inev. Acc.
Kapler 11 P.D. 189.

But where a schooner in a leaky condition, in order to avoid sinking in deep water, cast off from a wharf alongside which she was lying, and before she was got under command drove against another vessel, it was held that the collision was not an inevitable accident (*h*). In the case of a ship improperly attempting to pass another ashore in a narrow channel, it was held, in America, that in attemping to pass clear of the ship ashore, she did so at her own peril (*i*). In this country it has been held that a ship driven from her moorings by another which came foul of her in a gale of wind, could not escape liability to a third ship against which she drove, she having omitted to let go a second anchor (*k*).

Negligence in a salvor.

If a vessel engaged in rendering salvage service to another negligently runs into the vessel she is assisting, she is liable for the damage; but she does not thereby forfeit her right to a sum which has been previously agreed upon as remuneration for the salvage service, unless the negligence is very gross. In such cases the Court regards error or negligence in the salvor less severely than in ordinary cases of collision (*l*). If the salvor, without negligence on her own part, is injured in a collision with the ship she is assisting, caused by negligence of the latter, she can recover for her loss (*m*).

Or a tug.

It is an implied term of the ordinary towage contract, that each vessel shall be conducted with proper care and skill. The general rule is, that the tug is bound to obey the orders of the tow; but both as between themselves and as regards other ships the tug and her tow are each under the ordinary obligation to show proper skill and care in

(*h*) *Sherman* v. *Mott*, 5 Bened. 372.

(*i*) *The Merrimac*, 14 Wall. 199.

(*k*) *The Pladda*, 2 P. D. 34; and see *The City of Peking*, 14 Ap. Cas. 40, as to having a second anchor ready to let go.

(*l*) *The C. S. Butler* and *The Baltic*, L. R. 4 A. & E. 178. See also *The Thetis*, 3 Mar. Law Cas. O. S. 357; *Stevens* v. *The S. W. Downs* and *The Storm*, Newb. Ad. 468.

(*m*) *The Mud Hopper*, 40 L. T. N. S. 462.

avoiding collision. Their respective duties and liabilities will be considered in a subsequent chapter (*n*).

Negligence causing collision.

There is sometimes difficulty in determining whether negligence of which a ship is proved to have been guilty at or about the time of the collision, or in some way connected with the collision, is negligence contributing to the collision. The general rule is that a wrongdoer is liable for all the reasonable consequences of his negligence. Whether a collision which occurs under circumstances brought about by previous negligence can be said to have been caused by that negligence, must be determined by the particular circumstances of the case.

A passenger on board *The Bachelor* was injured by an anchor on board that vessel which was caused to fall on him by a collision for which *The Sons of the Thames* was in fault. In an action by the passenger against the owners of *The Sons of the Thames*, Pollock, C.B., left it to the jury to say whether there was negligence on the part of the crew of *The Bachelor* in stowing the anchor so that it fell on the plaintiff, and whether there was negligence on the plaintiff's part in being in the part of the ship where the anchor was stowed. The verdict was for the plaintiff; the jury finding that there was no negligence on his part, or on the part of the crew of *The Bachelor*. A rule *nisi* for a new trial which was obtained on the ground that the verdict was against the weight of the evidence was discharged. In discharging the rule, Pollock, C.B., said, with regard to the general law, that if the negligence of the plaintiff did not in any degree contribute to the immediate cause of the accident, that negligence ought not to be set up as a defence to the action. And he doubted whether a person, who is guilty of negligence, is responsible for all the consequences which might under any circumstances arise, and in respect of mischief which could,

(*n*) *Infra*, p. 243.

by no possibility, have been foreseen, and which no reasonable person would have anticipated (*o*).

Negligence causing the loss but not the collision.

The principle here enunciated must be applied with caution. Where the negligence is an immediate cause of the loss, it is material in an action to recover damages for that loss, although it is in no way a cause of the collision in which the loss occurred. "The cause of action in collision cases is not merely the fact of the ships having come into impact with one another, for that by itself is no cause of action, but that damage, in the sense of injury, was caused to the property of the plaintiffs by reason of that collision" (*p*). Thus where a collision is caused entirely by the negligence of ship A., and there would have been no damage to either ship but for an improper act of B., both ships are in fault, and the owners of each are liable for half (*q*) the loss suffered by the other. It is no answer to the claim of a plaintiff, whose negligence caused the collision, for the defendant, whose negligence caused the loss, to say: True it is, there would have been no loss but for my improper act; but you are the person who caused the loss, for if your ship had not been improperly navigated there would have been no collision and no loss. Unless the negligence of the one ship would, but for the negligence of the other, have caused no loss, the former ship is liable at least for half the loss of the other.

The Margaret.

In *The Margaret* (*r*), before the Court of Appeal, a dumb barge by her own negligent navigation came into collision with a schooner fast to a proper mooring buoy in the Thames. The schooner was wholly free from blame in respect of the collision, but her anchor, which was hanging from her hawse pipe, with the stock above the water,

(*o*) *Greenland* v. *Chaplin*, 5 Ex. 243. This action and *Cattlin* v. *Hills*, 8 C. B. 123, arose out of the same collision.

(*p*) *Per* Brett, L. J. *The Margaret*, 6 P. D. 76. And see *per* Lindley, L. J., *The Bernina*, 12 P. D. 58, 88.

(*q*) As to the rule of division of loss when both ships are in fault, see below, pp. 125—145.

(*r*) 6 P. D. 76.

pierced and sank the barge. This was an improper position for the anchor, and contrary to a bye-law made under a local Act in force in the Thames. But for the improper position of the schooner's anchor the barge would have suffered no injury. It was held that both craft were in fault; and that the schooner was liable for half the loss of the barge. In the Court below it had been held that the barge could not recover anything, she being alone in fault for the collision. This decision was varied by the Court of Appeal on the ground above stated—namely, that though the negligence of the schooner did not contribute to the collision, it did contribute to the cause of action, namely, the loss to the owners of the barge (*s*).

Causa proxima non remota spectatur.

On the other hand, the maxim *causa proxima non remota spectatur* applies to distinguish negligence for the consequences of which a defendant is liable from that which is merely collateral and immaterial upon the question of liability (*t*). Negligence such as will attract liability cannot be established merely by showing that, but for a previous improper act of the defendant, the collision would not have occurred. The act complained of "must have some proper connection, as a cause, with the damage which followed, as its effect" (*u*). Whether this proper connection exists between the act complained of and the loss is, it seems, a question of fact, and ordinarily a question for the jury (*x*).

The question as to what are the consequences of a negligent or wrongful act for which the wrongdoer is liable was much discussed in the case of *Clark* v. *Chambers* (*y*).

(*s*) *The Scotia*, 63 L. T. N. S. 324; *Sills* v. *Brown*, 9 Car. & P. 601, and *The Gipsy King*, 2 W. Rob. 537, so far as they are inconsistent with *The Margaret*, would not, it seems, be now followed.

(*t*) See *per* Selborne, C., 6 App. Cas. 219; and Lord Blackburn, *ib.* p. 226.

(*u*) *Per* Selborne, C., *ubi sup.*

(*x*) See *Tuff* v. *Warman*, 2 C. B. N. S. 740; 5 C. B. N. S. 573; *Milwaukee Rail. Co.* v. *Kellog*, 4 Otto, 469.

(*y*) 3 Q. B. D. 327; see the rule affirmatively stated by the Master of the Rolls in *Re London, &c. Railway and Trustees of Gower's Walk Schools*, 24 Q. B. D. 326, at p. 329.

The rule accepted by the Court (*z*) was, that an action would not lie where the loss, although arising from an unlawful or negligent act of the defendant, did not immediately flow from it, and was not the reasonable, probable, or likely result of it.

In *Spaight* v. *Tedcastle* (*a*), the question was whether the owners of a ship in tow which had negligently permitted her tug to go too close to a bank, were prevented by the doctrine of contributory negligence from recovering from the owners of the tug damages for injury sustained by the subsequent fault of the tug in altering her course so as to put the ship ashore on a bank. It was held that, though those in charge of the tow had negligently allowed the tug to take the tow too close to the bank, yet, since the tug could with proper care, notwithstanding the negligence of the tow, have kept the tow clear of the bank, and had by an improper alteration of the helm caused the tow to go ashore, the tug was liable.

No difference between the rules of law and Admiralty as to what is negligence.

The question whether a particular act of negligence was a cause of the loss, so as to make the person charged with negligence responsible for the loss, must, it would seem, be answered in the same way, whether it is the act of a plaintiff or of a defendant; whether the negligence of other parties contributed to the loss or not; and whether the action is at common law or in Admiralty (*b*). "There is no difference between the rules of law and the rules of Admiralty to this extent, that where any one transgresses a navigation rule, whether it is a statutory rule or whether it is a rule that is imposed by common sense, what may be called the common law, and thereby an accident happens of which that transgression is the cause, he is to blame,

(*z*) Laid down by Pollock, C. B., in *Greenland* v. *Chaplin*, 5 Ex. 243, 248; *supra*, p. 14; and by the Exchequer Chamber in *Sharp* v. *Powell*, L. R. 7 C. P. 253. See also *Lawrence* v. *Jenkins*, L. R. 8 Q. B. 274; *Sneesby* v. *Lancashire and Yorkshire Rail. Co.*, L. R. 9 Q. B. 263.

(*a*) 6 App. Cas. 217.

(*b*) See *per* Campbell, C., *The Friends*, 4 Moo. P. C. C. 314; *per* Lord Blackburn, *Cayzer* v. *Carron Co.*, 9 App. Cas. 873, 880.

and those who are injured by the accident, if they themselves are not parties causing the accident, may recover both at law and in Admiralty" (*c*). The learned lord, in a subsequent part of his judgment in the same case (*d*), states that the only case which seems to point to there being any difference between the rules of law and Admiralty as to what is negligence causing the loss is *The Fenham* (*e*), in which there are expressions of Lord Romilly to the effect that infringement of a statutory rule of navigation is to be taken as a cause of the collision, unless the person charged proves the contrary. Those expressions, he points out, may well apply to such an infringement as that in *The Fenham* (absence of lights), but are not to be extended to every infringement of every rule of navigation.

Contributory negligence.

It has been suggested that the class of cases of which *Davies* v. *Mann* is the best known example, have no application in Admiralty; and there are cases which appear to give some support to the contention. The facts of *Davies* v. *Mann* (*f*), the well-known "donkey case," were shortly these:—The owner of a donkey, which had been negligently left hobbled and unguarded on a highway, sued the defendant, by the negligence of whose servant in driving along the highway at too rapid a speed the donkey was run over and injured. It was held that the donkey-owner could recover, his negligence notwithstanding. The suggestion is, that in a case of collision between ships, negligence, such as that of the donkey-owner in *Davies* v. *Mann*, would render the shipowner liable, although no collision would have occurred if the other vessel had been navigated with ordinary care. *The Fenham* (*g*) and *Hay* v. *Le Neve* (*h*) have been cited as authorities to this effect. In *The Fenham* the facts were these:—A steamship in the North Sea, after sun-down on a dusky evening in November, struck a brig which was not carrying lights as required by the Regula-

(*c*) *Per* Lord Blackburn, 9 App. Cas. 880.
(*d*) P. 882.
(*e*) L. R. 3 P. C. 212.
(*f*) 10 M. & W. 546.
(*g*) L. R. 3 P. C. 212.
(*h*) 2 Shaw's Scotch App. Cas. 395.

tions of 1863. In the absence of proof to the contrary, the Privy Council held that the absence of lights caused the collision. In delivering judgment Lord Romilly thus stated the rule as to proof in such cases:—"If it is proved that any vessel has not shown lights, the burden lies on her to show that the non-compliance with the Regulations was not the cause of the collision." In *Hay* v. *Le Nere* (*h*), a vessel brought up at night in an improper place and with no light exhibited was run into by another ship. It was held that the vessel at anchor, as well as the other vessel, was in fault. In both these cases the negligence of the plaintiff (carrying no light, and bringing up in an improper place) was not unlike that of the donkey-owner in *Davies* v. *Mann*, and it was contended in *The Fenham* that with ordinary care the defendant could have avoided the collision, notwithstanding the negligence of the plaintiff in carrying no lights. In both cases the legal consequence of the negligence was different from that in *Davies* v. *Mann*. Again, in an Irish case (*i*) it was doubted whether in Admiralty the doctrine of *Davies* v. *Mann* had any application.

But it is clear that there is no difference between the rules of law and of Admiralty (*k*) as to what amounts to negligence causing collision; and that, before a vessel can be held to be in fault for a collision, negligence causing or contributing to the collision must be proved. Thus, in *The Margaret* (*l*), a vessel infringed a statutory rule of navigation, and was in that respect guilty of negligence; and without that negligence, other circumstances being the same, the collision would not have happened; yet it was held that this negligence was not a cause of the collision.

(*h*) 2 Shaw's Scotch Ap. Cas. 395.

(*i*) *The Meteor*, Ir. Rep. 9 Eq. 567.

(*k*) See *per* Lord Blackburn, *Ceyzer* v. *Carron Co.*, 9 App. Cas. 873, 882 (*The Margaret*). In *The Khedive* (5 App. Cas. 876, 892), it was assumed by Lord Blackburn that *Davies* v. *Mann* applied in Admiralty.

(*l*) 9 App. Cas. 873.

The decision in such a case will be the same, with regard to the liability of the ship in question, whether the other ship is in fault or not. In *The Margaret* the one ship was held to be in fault, because with ordinary care she could have avoided a collision, notwithstanding the negligence of the other; and it was for this reason that the negligence of the latter was held not to be a cause of the collision.

The Lord Saumarez (*m*), an early case, is to the same effect as *The Margaret*. There a vessel recovered full damages, though in a fog she was carrying too great a press of sail, and was proceeding at too great a rate of speed. The decision proceeded upon the same grounds—that the defendant could with ordinary care have avoided the collision, notwithstanding the negligence of the plaintiff.

Hay v. *Le Neve* and *The Fenham* are not inconsistent with *The Margaret* and *The Lord Saumarez*. The facts in those cases were not analogous to those in *Davies* v. *Mann*. They differed in this—that the negligence of the plaintiffs in the former cases was such that the defendants could not with ordinary care have avoided its consequences; whereas in *Davies* v. *Mann* the defendant could with ordinary care have avoided the donkey (*n*).

Confusion has been caused by the language used in some of the cases with regard to contributory negligence. In *Radley* v. *London & North-Western Railway Co.* (*o*), it is stated by Lord Penzance that, "The plaintiff in an action for negligence cannot succeed, if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident." But "though the plaintiff may have been guilty of negligence, *and although that negligence may in fact have con-*

(*m*) 6 Not. of Cas. 600; cf. *The Argo*, Swab. 462; *infra*, p. 243; *The Swanland*, 2 Sp. E. & A. 107.

(*n*) *Dowell* v. *General Steam Navigation Co.*, 5 E. & B. 195; and *Morrison* v. *General Steam Navigation Co.*, 8 Ex. 733, are cases with regard to absence of lights. In the former, the ship without lights was held in fault; in the latter, not.

(*o*) 1 App. Cas. 754.

tributed to the accident, yet if the defendant could in the result by exercise of ordinary care and diligence have avoided the mischief which happened, the plaintiff's negligence will not excuse him," *i.e.* the defendant. *Davies* v. *Mann* and *Tuff* v. *Warman* (*p*) are cited as establishing this. On the other hand, in *Dowell* v. *General Steam Navigation Co.* (*q*), Lord Campbell, C. J., said—"There" (in *Davies* v. *Mann*) "although without the negligence of the plaintiff the accident would not have happened, the negligence *is not supposed to have contributed to the accident* within the rule upon this subject; and if the accident might have been avoided by the exercise of ordinary care and skill on the part of the defendant, to his gross negligence it is entirely ascribed, he, and he only, proximately causing the loss." It is not easy to reconcile these views with regard to the character of the negligence of the plaintiff in *Davies* v. *Mann*. The question whether a specified act of negligence is a cause of the accident is a question of fact and not of law (*r*). *Davies* v. *Mann* and the cases following it seem to show that even where, as matter of fact, an act of negligence of A. did contribute to the accident, the other party (B.) will (as defendant) be liable for the whole loss, or (as plaintiff) will be unable to recover, if he could with ordinary care have avoided the accident, notwithstanding the negligence of A. (*s*).

The difficulty may be put in another way. Did *Davies* v. *Mann* decide that, assuming contributory negligence in the plaintiff, he could recover notwithstanding; or that, though there was contributory negligence in fact, there was none in law? *Radley* v. *London & N. W. Rail. Co.*

(*p*) 5 C. B. N. S. 573; see the judgment of Cresswell, J., 26 L. J. C. P. 263, 267. Cf. also *per* Dr. Lushington in *The Argo*, Swab. 462; *infra*, p. 243.

(*q*) 5 E. & B. 195.

(*r*) See *per* Lord Blackburn, 9 App. Cas. 879. But see *contra*, *per* Williams, J., *Tuff* v. *Warman*, 2 C. B. N. S. 740, 758.

(*s*) Cf. *The Argo*, Swab. 462; *infra*, p. 243.

points to the former as the correct view of the case; *The Margaret* (*t*) looks the other way. There Lord Blackburn appears to have considered that if the plaintiff's negligence did in fact contribute to the collision he would be liable; and that in *Davies* v. *Mann* there was no contributory negligence. But the difficulty is rather one of words than of substance; for, with perhaps one exception, the cases agree in this, that negligence in one party is immaterial, if by ordinary care the other could, notwithstanding that negligence, have avoided the accident (*u*). The exception mentioned above is *The Vera Cruz* (No. 1) (*x*), when before Butt, J. In that case Butt, J., appears to have questioned the dictum of Lord Penzance quoted on a former page (*y*), to the effect stated in the last paragraph. If the law be as there stated it would, he thought, put an end to the doctrine of contributory negligence altogether; since, in every case where there is contributory negligence on the part of the plaintiff, there is, *ex hypothesi*, negligence (*i. e.* want of "ordinary care and diligence") on the part of the defendant. It is submitted that what was meant by Lord Penzance was ordinary care and diligence on the part of the defendant "in the result," *i. e.* taking into consideration the negligence of the plaintiff and the circumstances existing after or by reason of it; or, as expressed by Lord Blackburn in another case, "proper care, subsequently exerted" (*z*). This was the view of Lord Watson in *Wakelin* v. *London and South Western Rail. Co.* (*a*). "Contributory negligence," he said, "consists in the

(*t*) See also *Spaight* v. *Tedcastle*, 6 App. Cas. 217, 219, *per* Lord Blackburn.

(*u*) Cf. Pollock on Torts, 374 *seq.*, where the true view is explained: Contributory negligence of the plaintiff does not prevent him from recovering; he does not recover because the negligence of the defendant was not the proximate cause of the loss.

(*x*) 9 P. D. 88. The decision in this case was ineffectual, the House of Lords having subsequently held that the Court had no jurisdiction.

(*y*) P. 20.

(*z*) *Spaight* v. *Tedcastle*, 6 App. Cas. 217, 226; see also *per* Lord Watson, *The Margaret*, 9 App. Cas. 873, 886; *per* Wightman, J., *Tuff* v. *Warman*, 5 C. B. N. S. 573; *per* Lord Campbell, *supra*, p. 21.

(*a*) 12 App. Cas. 41.

absence of that ordinary care which a sentient being ought reasonably to have taken for his own safety. . . . If by the use of ordinary caution he might have avoided the injury, and did not, he is not entitled to recover damages."

The result of the cases, therefore, seems to be that—(1) a ship, A., may recover full damages against another, B., though she (A.) has been guilty of negligence contributing to the collision, provided B. could with ordinary care, exerted up to the moment of the collision, have avoided it; (2) A. can recover nothing, though B. was guilty of negligence contributing to the collision, if A. by ordinary care, exerted up to the moment of the collision, could have avoided it; (3) A. may recover half her loss, though she has been guilty of negligence contributing to the collision and rendering the collision unavoidable except by extraordinary care on B.'s part, if B. has been guilty of negligence contributing to the collision and rendering it unavoidable except by extraordinary care on A.'s part; and (4) in the last case B. may also recover half her loss (*b*).

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Where a collision is caused by negligence in those on board both ships, and the negligence in ship A. is negligence of her officers or crew for which her owners are liable, while the negligence in ship B. is negligence of a compulsory pilot for which her owners are not liable, the question arises whether the owners of B. are prevented by the doctrine of contributory negligence, or by the practice of the Court of Admiralty, from recovering more than half their loss. It seems to be settled that they are entitled to recover half their loss, without deducting anything in respect of the loss caused to the other ship by the fault of the pilot; but that they are entitled to recover no

Negligence of a compulsory pilot brings into operation the rule of division of loss where the other ship is also in fault.

(*b*) Cf. *per* Lindley, L. J., *The Bernina*, 12 P. D. 58, 89; and *per* Lord Esher, M. R., *ibid.* p. 61, for summaries of the law.

more than half their loss (*c*). Thus the fault of the pilot affects the ship to some extent; whether it affects the ship in a case where she is not herself in collision, so as to prevent her owners from recovering damages against the owners of another ship by whose negligence she is injured, is not clear (*d*). Notwithstanding a decision to the contrary (*e*), the better opinion seems to be that she is not so affected.

Negligence causing the loss, or merely collateral.

The question whether a particular act of negligence, not directly causing the collision, but connected with it, is negligence contributing to the collision, seldom arises in collision cases. It has, however, occasionally been discussed, and it will be convenient here to indicate generally the form in which it may occur.

Defective equipment.

If a ship is negligently sent to sea in a defective or inefficient state as regards her hull or equipment, and a collision occurs, which probably would not have occurred but for her defective condition, the collision will be held to have been caused by the negligence of her owners. Thus a collision caused by the giving way or inefficiency of the steering gear (*f*), the parting of chain cable or moorings (*g*), the inefficiency of the tug (*h*), improper trim such as to render her unmanageable and dangerous, may be held to be caused by the negligence of her owners in permitting her to be navigated in a condition dangerous to other ships. In such cases it is, of course, open to the owners to show that the defect in the gear was latent (*i*), or that they

(*c*) See *The Hector*, 8 P. D. 218, 222.

(*d*) See *Spaight* v. *Tedcastle*, 6 App. Cas. 217, and observations of Lord Blackburn (p. 223) on *The Energy*, L. R. 3 A. & E. 48; see also *Dudman* v. *Dublin Port and Docks Board*, Ir. Rep. 7 C. L. 518.

(*e*) *The Energy*, *supra*.

(*f*) *The Virgo*, 3 Asp. Mar. Law Cas. 285; *The Warkworth*, 9 P. D. 20; *The Livia*, 1 Asp. Mar. Law Cas. 204; *The Peru*, 1 Pritch. Ad. Dig. 3rd ed. 1412; *The M. M. Caleb*, 10 Blatchf. 467. See also *The European*, 10 P. D. 99, steam steering gear "taking charge."

(*g*) See *The William Lindsay*, L. R. 5 P. C. 338.

(*h*) *The Ocean Wave*, *Marshall* v. *Moran*, L. R. 3 P. C. 205; *The Belgic*, 2 P. D. 57, note; *The Julia*, Lush. 224.

(*i*) *The Virgo*, 3 Asp. Mar. Law Cas. 285.

(e) The European 10 P.D. 99

took reasonable care to send the ship to sea in a safe and efficient state (*k*); and if they satisfy the Court that such was the case they will not be liable.

Ship disabled and unmanageable by her own fault.

If a ship is by her own fault disabled or unmanageable, and a collision occurs in consequence, the question arises whether she is to be held in fault for the collision; in other words, whether her original negligence is negligence contributing to the collision. The cases upon the point are conflicting. Where a ship by her own negligence got ashore, and in coming off unavoidably did damage, it was held that her owners were liable (*l*). So where a vessel having lost her lights in a collision with one ship was afterwards in collision with another ship, it appears to have been the opinion of the Court that, if the first collision was caused by her own fault and the second collision was caused by the absence of proper lights, she must be held to be in fault for the second collision (*m*). On the other hand, where a vessel was sunk in the Thames in a collision caused by her own negligence, and another vessel six hours afterwards struck on the wreck and was injured, it was held by the Court of Appeal, in the absence of proof of negligence subsequent to the first collision, that her owners were not liable for the second collision. "It seems clear to me," said Brett, L.J., "that no greater liability can exist against the defendants than if their steamship had sunk without negligence" (*n*). There is no doubt that both in the case of a ship disabled, and a ship sunk, whether by her own previous negligence or not, special and additional care and precautions are required on the part of those in charge to avoid doing injury to other ships (*o*). But that

(*k*) *Moffatt* v. *Bateman*, L. R. 3 P. C. 115.

(*l*) *Lords Bailiff Jurats of Romney Marsh* v. *Corporation of the Trinity House*, L. R. 5 Ex. 204; *ibid.* 7 Ex. 247.

(*m*) *The Kjobenhavn*, 2 Asp. Mar. Law Cas. 213. The facts were such as to render a decision upon the point unnecessary.

(*n*) *The Douglas*, 7 P. D. 151, 160. In this case *Lords Bailiff Jurats of Romney Marsh* v. *Corporation of the Trinity House* does not appear to have been cited.

(*o*) See *Seccombe* v. *Wood*, 2 Moo.

a ship sunk or disabled in a collision caused by her own negligence should afterwards, and without having been guilty of any further negligence, be held liable for a subsequent and distinct collision, would seem to be contrary to the principle, above stated, that a wrongdoer is liable only for the reasonable consequences of his negligence (*p*).

It may happen that two or more collisions are so immediately and directly the result of one negligent act that the wrongdoer will be liable for the damage done in each collision, though after the first collision the others were inevitable, and though, but for the first collision, the others would not have happened (*q*). Thus a ship by her own negligence adrift in a crowded dock or harbour would, it is submitted, be liable for all the damage done by her in successive collisions with other craft before she was brought up and secured. In such a case it would be immaterial that, after the first collision, the others were inevitable, or that, but for the first collision, the others would not have happened. The reasonable consequence of sending a ship adrift under such circumstances is that she will strike and injure other craft to leeward.

Three or more ships implicated.

If a collision occurs between two ships, A. and B., by the fault of one of them, and A. or B., or both A. and B., whilst in collision, or in consequence of the collision, drive against and injure a third ship, C., C. can recover against the ship in fault for the first collision. But the ship that fouls her is not liable unless she was in fault either for the first or the second collision (*r*). If two ships, A. and B.,

& Rob. 290; *Brown* v. *Mallet*, 5 C. B. 599; *White* v. *Crisp*, 10 Ex. 312; *Kidson* v. *M'Arthur*, 5 Sess. Cas. 4th Ser. (Rennie), 936; *The Douglas*, *ubi supra*. See further as to the duty of those in charge of sunken ships, *infra*, pp. 96, 361.

(*p*) In *Dudgeon* v. *Pembroke*, L. R. 9 Q. B. 581 (an insurance case), where a vessel went ashore partly because she leaked and became waterlogged and unmanageable, and partly from stress of weather, it was held that the cause of her loss was perils of the sea, and not unseaworthiness.

(*q*) Such a case occurred in *The Creadon*, 5 Asp. M. C. 585, which came before the Court on limitation of liability.

(*r*) *The Venus*, 1 Pritch. Ad. Dig. 3rd ed. 1678; S.C. nom. *The Lyra* and *The Venus*, 2 Mar. Law Cas. O. S. Dig. 522; *The Hibernia*, 4 Jur.

are both in fault for a collision between one of them and a third ship, C., C. can proceed in Admiralty against either A. or B., or she can proceed against both of them. It seems that she can recover the whole of her loss against one of them (*s*). If C. is in tow of A. or B. the case is different; for the ship in tow is generally responsible for the fault of her tug (*t*).

Damage, but no collision.

Where by the negligent navigation of one ship a collision occurs between two others, or another ship is damaged, either by collision or in any other way, the owners of the ship in fault are liable at law, and the ship, it seems, is liable in Admiralty (*u*). Thus, a steamship that sank another craft by the swell raised by her excessive speed was held liable (*x*). Where, in order to avoid a collision with A., made imminent by A.'s fault, a tug, B., was compelled to cast off her tow, C., and C. went ashore, it was held that C. could recover against A. (*y*). In order to avoid A. lying ashore in a fairway without a light, B. was obliged to put herself ashore; it was held that B. could recover against A. (*z*). The value of an anchor and chain slipped to avoid collision, made imminent by the other ship's fault, has been recovered in Admiralty (in America) and at law (*a*).

Alteration of

In *The Seaton* (*b*) two steamships were proceeding on

N. S. 1244; *The Sisters*, 1 P. D. 117; *The Moxey*, Abbot, 73.

(*s*) *The Venus*, *ubi supra*. In *The Milan*, Lush. 388, the owners of cargo on board one of two ships, both of which were in fault, recovered only half their loss against the other ship. In *The Bernina*, 12 P. D. 58; 13 App. Cas. 1, this point was left open. As to the liability of joint wrongdoers at law, see p. 103.

(*t*) See below, Ch. VIII.

(*u*) *The Wheatsheaf*, 2 Mar. Law Cas. O. S. 292; *The Industrie*, L. R. 3 A. & E. 303; *The Energy*, L. R. 3 A. & E. 48; *The Sisters*, 1 P. D. 117; *Luxford* v. *Large*, 5 C. & P. 421; *The Niobe*, 13 P. D. 55 (the action appears to have been *in rem*).

(*x*) *The Batavier*, 1 Sp. E. & A. 378; 9 Moo. P. C. C. 286; *Luxford* v. *Large*, *ubi supra*.

(*y*) *The Wheatsheaf*, *ubi supra*.

(*z*) *The Industrie*, *ubi supra*.

(*a*) *The Perkins*, 2 Mar. Law Cas. O. S. Dig. 548; *Majoribanks* v. *Boyd*, Times, 11th Dec. 1823, *The Almora's* cable fouled *The Astell's* when getting under way in the Hooghly, and *The Astell* slipped.

(*b*) 9 P. D. 1.

course causing risk of collision.

parallel courses, one on the quarter of the other and overtaking her. The sternmost ship altered her course, when three miles off the ship ahead, so as to make her course converge with that of the other and bring about risk of collision. After this she never altered her course, and struck the ship ahead. The leading ship appears either to have done nothing until she was struck, or to have taken a course which was clearly wrong. The overtaking ship was held solely in fault (*c*).

Whether negligence of the plaintiff is to be taken into account in estimating damages.

In common law actions juries have sometimes been permitted to take a so-called "equitable" view of the circumstances of the case; and, where there have been faults on both sides, to award a smaller sum for damages than they would have awarded had there been no fault on the part of the plaintiff. Thus, in *Raisin* v. *Mitchell* (*d*), the owner of a brig that had been in collision with a sloop was sued by the owner of the latter, the claim being for 500*l.* damages. There does not appear to have been any dispute as to the amount of the loss, but the jury found a verdict for the plaintiff, with damages 250*l.* In answer to a question from the judge (Tindal, C. J.), how they had made up their verdict, the foreman said that there had been faults on both sides. The defendant contended that this was in effect a verdict in his favour; but it was upheld as a verdict in favour of the plaintiff for the smaller sum, 250*l.*

This, and another (*e*) common law case to the same effect, cannot be treated as authorities for the proposition that negligence of the plaintiff which did not either wholly or in part cause the loss is material upon the question of

(*c*) *Qu.* whether in this case the leading ship was not also in fault. It would seem that, with ordinary care, she could have avoided the consequences of the defendants' negligence. See *supra*, pp. 18—23.

(*d*) 9 C. & P. 613.

(*e*) *Smith* v. *Dobson*, 3 Scott, N. R. 336; 3 Man. & G. 59 (*infra*). The latter report does not agree with the former as to the reasons given by the jury for their verdict. See some remarks of Sir J. Patteson on this case in *Netherlands Steamboat Co.* v. *Styles*, 9 Moo. P. C. 286, 297.

damages. Is is wholly immaterial, and the rule is so stated by Pollock, C. B., in *Greenland* v. *Chaplin* (*f*).

Again, in an action to recover damages for the sinking of a loaded barge, it appeared that two steamships had passed the barge shortly before she sank, and that she was sunk by the swell raised by one or both of them. The steamship that passed first was the larger of the two, and raised the greater swell; the second belonged to the defendants. The loss on the barge and her cargo was 80*l*. The jury found a verdict for the plaintiff, damages 20*l*., with the remark that they did not think the blame was attributable to the defendants alone, and that the barge was improperly loaded. A motion to enter the verdict for the defendants was dismissed. Erskine, J., after remarking that, although the swell of the defendants' steamship probably would not, but for the swell of the other steamship, have caused the damage, yet strictly the defendants were liable for the whole damage, added: "The jury, however, taking an equitable view of the facts, evidently thought it not fair to make the defendants pay for an injury which was only in part attributable to them;" and he appears to have considered that the jury were not wrong in giving a smaller sum for damages than the proved amount of the loss (*g*).

What can be recovered as damages.

Closely connected with the question, whether a specific act of negligence caused the loss, is the question, whether a particular item of loss can be recovered as damages caused by the negligent act. The same principle applies in either case—that the wrongdoer is liable for all the reasonable consequences of his negligence. The cases connected with the question as to the *quantum* of damages will be considered in a subsequent chapter (*h*).

Wilful injury to a ship.

Where, as has sometimes happened, one ship is wilfully and maliciously (*i*) driven against another, the wrongdoer

(*f*) 5 Ex. 243.
(*g*) See note (*e*), *supra*.
(*h*) *Infra*, p. 110.
(*i*) For an instance of such a case

would probably be held liable for the entire loss, notwithstanding negligence in the other ship in not avoiding the collision.

Proof of negligence.

To enable the plaintiff in a collision action to recover damages, he must prove affirmatively that his loss was caused by the negligence of the defendant or of some person for whose acts he is liable. The general rule was thus stated by Lord Wensleydale (*i*): "The party seeking to recover compensation for damage must make out that the party against whom he complains was in the wrong. The burden of proof is clearly upon him, and he must show that the loss is to be attributed to the negligence of the opposite party. If at the end he leaves the case in even scales, and does not satisfy the Court that it was occasioned by the negligence or default of the other party, he cannot succeed." So in the case then before the Court, it being proved that the plaintiff ship had no light, the inference was that, but for the absence of the light, the collision probably would not have occurred, and the plaintiff failed to recover (*k*).

Burden of proof.

The plaintiff must therefore make out at least a *primâ facie* case. The burden of proof lies on him so far (*l*). But it does not follow that it lies on him throughout the whole case. Having made out a *primâ facie* case of negligence on the part of the defendant, the burden of proof is shifted, and the defendant will be liable unless he proves that his negligence in no way contributed to the loss (*m*).

see L. R. 1 A. & E. 64; *The Ida*, Lush. 6.

(*i*) See *Morgan* v. *Sim*, *The London*, 11 Moo. P. C. C. 307, 312. See *Harris* v. *Anderson*, 14 C. B. N. S. 499, for a case where the plaintiff failed through absence of such proof; and cp. *Wakelin* v. *L. and S. W. Rail. Co.*, 12 App. Cas. 41.

(*k*) In *The Fenham*, L. R. 3 P. C. 212, a similar presumption arose. See the remarks of Lord Blackburn on this case, *Cayzer* v. *Carron Co.*, 9 App. Cas. 873, 882.

(*l*) *The Bolina*, 3 Not. of Cas. 208, 210; *The Carron*, 1 Sp. E. & A. 91; *The London*, 11 Moo. P. C. C. 307; *The Marpesia*, L. R. 4 P. C. 212; *The Benmore*, L. R. 4 A. & E. 132; *The Abraham*, 28 L. T. N. S. 775; *The Albert Edward*, 44 L. J. Ad. 49.

(*m*) *The Ligo*, 2 Hag. Ad. 356, 360; *The Sisters*, 1 P. D. 117; *The City of Antwerp* and *The Friedrich*, L. R. 2 P. C. 25; *Cayzer* v. *Carron*

"Where certain inferences of fact have been established by numerous cases, they become to a great extent very nearly of the same authority as if they were propositions of law" (*n*). This is notably the case in collision actions. In the not infrequent case of a collision between a ship under way and another at anchor, provided there was no negligence of the latter in respect of her lights or place of anchoring, the burden (*o*) is upon the other ship to show that she was not in fault (*p*). When a vessel under steam runs down a ship at her moorings in broad daylight, that fact is by itself *primâ facie* evidence of fault (*q*). And the rule seems to be the same in the case of a fishing boat fast to her nets (*r*), a ship in stays, hove to (*s*), or otherwise not under command, and, without negligence on her own part, unable to keep out of the way. It has been pointed out in America by the Supreme Court that a ship in tow in collision with another tow is in a wholly different position, as regards the burden of proof of negligence in one or both tugs, from that of a ship at anchor suing another under way (*t*).

Where one ship is by law required to keep out of the way.

Where two ships are approaching each other so as to involve risk of collision, the law (*u*) usually requires one of

Co. (*The Margaret*), 9 App. Cas. 873. See *Daniel* v. *Metropolitan Railway*, L. R. 3 C. P. 216; *ibid.* 591, as to what is sufficient evidence of negligence; S. C. *ibid.* 5 H. L. 45.

(*n*) *Per* Mellish, L.J., L. R. 9 Ch. 713 (with reference to proof of damage in actions to restrain nuisances).

(*o*) See *The Indus*, 12 P. D. 46, as to how this burden may be discharged.

(*p*) *The Bothnia*, Lush. 52; *The Telegraph*, *Valentine* v. *Clough*, 1 Sp. E. & A. 427; *The Otter*, L. R. 4 A. & E. 203; *The Annot Lyle*, 11 P. D. 114; *The Beaver*, 2 Bened. 118, and *The Baltic*, *ibid.* 452, are American cases to the same effect.

(*q*) *Per* Lord Watson, *The City of Peking*, 14 App. Cas. 40, 43. See also *Reg.* v. *Cavendish*, I. R. 8 C. L. 178, where a cabdriver was convicted of manslaughter for running over a woman without further proof of negligence.

(*r*) *The Columbus*, 1 Pritch. Ad. Dig., ed. 1887, 239; *The Two Sisters*, *ibid.* 248; *The Bottle Imp*, 28 L. T. N. S. 286.

(*s*) *The Eleanor* and *The Alma*, 2 Mar. Law Cas. O. S. 240. But see *The London*, 6 Not. of Cas. 29; *The Rosalie*, 5 P. D. 245, in both of which cases the ships hove-to were held to be in fault.

(*t*) *The L. P. Dayton*, 13 Dav. 337.

(*u*) See the Regulations for Preventing Collisions at Sea, Arts. 14, 16, 17, 20, 22, *infra*.

them to keep out of the way and the other to keep her course. If a collision occurs between two such ships there is, it is submitted, no presumption that the ship required to keep out of the way is in fault (*v*); for the duty of the other ship to keep her course is no less stringent than that of the former ship, and until she proves that she did keep her course the fact of the collision is no evidence of negligence in the ship required to keep out of the way. But upon such proof being given, a presumption of fault in the ship required to keep out of the way arises, and unless she proves circumstances rebutting this presumption she will be held in fault without proof of any specific act of negligence on her part (*x*).

Though in clear weather, and under ordinary circumstances, the presumption is that a steamship is able to keep out of the way of a sailing ship, it may happen that by no fault of her own she is not able to do so. In such a case no presumption of negligence on the part of the steamship will arise. In a fog, for example, a sailing-ship has no right to rely upon an approaching steamship, which she cannot see, being able to keep out of her way. It is the duty of the sailing-ship, under such circumstances, to be in readiness to act herself; and, if she simply stands on her course and does nothing until the collision occurs, she may be held in fault (*y*).

Whether not hearing a fog-horn raises a presumption of negligence.

The question often arises whether credible evidence from people on board a ship, A., that they were listening but

(*v*) See *per* Westbury, C., *The City of Antwerp*, L. R. 2 P. C. 25; *infra*, p. 431.

(*x*) See the following American cases:—*The Carroll*, 8 Wall. 302, 304; *The Scotia*, 14 Wall. 170, 181; *New York, &c. Mail Co.* v. *Rumball*, 21 How. 372, 385. The French Courts adopt highly artificial presumptions as to which ship is in fault: see Les Codes Annotées (Sirey et Gilbert), Art. 407, C. C. By the German and Dutch Codes, if a ship sinks after collision before reaching port, the presumption is that she was lost by the collision: see German Comm. Code, Art. 739; Comm. Code of Holland, Art. 539. By the Maritime Code of Riga, the presumption was against a ship without a light: 4 Black Book of the Admiralty (Sir T. Twiss's ed.), 373, note.

(*y*) See *The Zadok*, 9 P.D. 114, 118.

heard no fog-horn or whistle from ship B., which was in fact in the neighbourhood of A. for some minutes, and subsequently came into collision with her, amounts to proof that no horn or whistle was sounded on board B. Such evidence frequently has to be weighed against equally credible evidence from B., that the horn or whistle was properly sounded on board B. The atmospheric conditions under which sounds are readily transmitted are peculiar; the attention of scientific men has been directed to the subject only in recent years, and the subject is at present imperfectly understood (*z*). The Courts are therefore unwilling to hold that negligence is necessarily to be inferred from the not hearing a fog-signal which is proved to have been sounded in the vicinity. It has recently been held that in such a case as that above suggested the evidence from both ships may be true, and that whilst, on the one hand, the evidence of A. will not necessarily prove that proper signals were not made by B., the evidence from B. will not prove that those on board A. were negligent in not hearing them (*a*).

Defective ship or equipment.

A ship is not one of those things dangerous in themselves, which entail upon their owners the responsibility of

(*z*) Professor Tyndall ("Sound," London: Longmans, Green & Co., 1883) has arrived at the following conclusions, based upon elaborate experiments at sea and on shore in the neighbourhood of the fog-syren at the South Foreland:—(1) that the condition most unfavourable for the transmission of sound is "water in a vaporous form mingled with the air, so as to render it turbid and flocculent. This acoustic turbidity often occurs in days of surprising optical transparency." (2) "The air associated with fog is as a general rule highly homogeneous and favourable to the transmission of sound." (3) Rain, hail, snow, fog, have no sensible power to obstruct sound. (4) The sound range (of the syren) on a calm day varies from two-and-a-half to sixteen-and-a-half miles. Some notes taken from Professor Tyndall's report on his experiments will be found in the Naut. Mag. for 1874, pp. 449, *seq.* Sir J. Douglas, in his evidence before the committee on electrical communication between lightships and the shore, 1887, states that the most powerful syren under certain conditions is not reliable beyond one mile; and that hot sun is bad for sound. He also states—a fact often doubted in Court—that he can tell within two degrees the direction from which a fog signal at sea comes.

(*a*) See *per* Sir J. Hannen in *The Elysia*, 4 Asp. Mar. Law Cas. 540; *The Zadok*, 9 P. D. 114, 118.

insuring safety (*b*). But the law casts upon the shipowner the duty of using reasonable care to ensure that his ship, when she sails and while she is under way, is in a condition in which she may be navigated with safety to other ships. If she damages another ship in consequence of the giving way or inefficiency of her gear or equipment, a *primâ facie* case of negligence arises. The presumption of negligence may, however, be rebutted by showing that the defect was latent, that reasonable care was in fact used to put and keep her in good condition, or that the giving way of the gear was due to stress of weather or other unavoidable cause (*c*).

In these cases the principle of *Scott* v. *London and St. Katherine's Dock Co.* (*d*) applies. It was there held that "where the thing" (goods suspended over the pavement, which fell and injured the plaintiff) "is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." In *Moffatt* v. *Bateman* (*e*), it was held that the principle of *Scott* v. *London and St. Katherine's Dock Co.* did not enable a person, who was injured by being thrown out of a vehicle, to recover damages without affirmative proof of negligence on the part of the defendant. "There is nothing more usual than for accidents to happen

(*b*) *Infra*, p. 72.
(*c*) See p. 11, above.
(*d*) 3 H. & C. 596; *Byrne* v. *Boodle*, 2 H. & C. 722; 33 L. J. Ex. 13. Of the former case Willes, J., said (L. R. 2 C. P. 11): "There the defendants had in their possession, and under their control, something which was dangerous unless reasonable precautions were taken to prevent injury to third persons." It would seem that these remarks apply to the owners of ships.

(*e*) L. R. 3 P. C. 115; *Manzoni* v. *Douglas*, 6 Q. B. D. 145, is a very similar case. The question as to what is *primâ facie* proof of negligence was much discussed in that case, and also in *Kearney* v. *London, Brighton and South Coast Rail. Co.*, L. R. 5 Q. B. 411; *ib.* 6 Q. B. 759; 39 L. J. Q. B. 200; *ib.* 40 Q. B. 285; *Daniel* v. *Metropolitan Rail. Co.*, L. R. 3 C. P. 216; *ib.* 591; *ib.* 5 H. L. 45.

in driving without any want of care or skill on the part of the driver"; and therefore no *primâ facie* presumption of negligence having been raised (this was the opinion of the Privy Council), it was held that affirmative evidence of negligence was necessary. In this case the kingbolt of the carriage, being defective, had broken, whereupon the horses bolted, and the plaintiff was thrown out. It was proved that the carriage was examined by a blacksmith every three months; and that the defendant, the owner, had not himself examined it before starting on the day of the accident. It was held that there was no negligence on the part of the owner in this respect.

Collision between a ship under way and another at anchor.

A vessel under way in the daytime, or on a clear night, which runs into another at anchor or stationary in the water is *primâ facie* in fault. And although a ship is brought up in an improper place, another running into her may be held in fault. "It is the bounden duty of a vessel under way, whether the vessel at anchor be properly or improperly anchored, to avoid, if it be possible, with safety to herself, any collision whatever" (*f*).

In *The Indus* (*g*), a case of collision between a steamship under way and a lightship, the only evidence on behalf of the lightship being that the collision happened without negligence on her part, it was suggested on behalf of the steamship that that evidence was consistent, *inter alia*, with a case of inevitable accident, and that the collision might have been caused by her steam-steering gear failing to act; but, in the absence of evidence that this actually occurred, it was held by the Court of Appeal that there was a *primâ facie* case of negligence against the steamship which had not been displaced, and accordingly that she was in fault.

Even if a ship is brought up in the fairway of a public navigable channel, so as to create a nuisance, a vessel which

(*f*) *Per* Dr. Lushington in *The Batavier*, 2 W. Rob. 407; *The Dura*, 1 Pritch. Ad. Dig. 3rd ed. 289; *The Maria Tribou*, 2 Sprague, 17; *Hay* v. *Le Neve*, 2 Shaw's (Scotch) App. Cas. 395.

(*g*) 12 P. D. 46.

by ordinary care could have passed clear will be held in fault for a collision with her (*h*).

It would seem that a vessel being launched and going into collision with another at anchor in the wake of the launching ways must be in fault. But in *The Cachapool* (*l*), where the ship at anchor had obstinately refused to be towed out of the way, she was held to be solely to blame.

Where a sailing ship was lost with all hands in a collision with a steamship, the steamship was held in fault upon the facts stated in her own pleadings, and with no further proof on the part of the sailing ship than the evidence of a person on board a third ship who had seen the sailing ship's lights burning some time before the collision (*k*).

It is not enough to prove that the other ship omitted to do something that would have prevented the collision, or that she did something without which the collision would not have occurred. It must be proved that the omission or act complained of was negligent. If the plaintiff ship has herself infringed the Regulations, or has been guilty of negligence which might have contributed to the collision, the burden is on her to show that the collision was not caused entirely by her own fault.

Burden of proving facts peculiarly in the knowledge of the person charged.

When one ship alleges want of lights or of a proper look out, or insufficient moorings, or any such negligence on board the other as it is impossible or difficult for her to prove by direct evidence, the burden is on the latter, as it is peculiarly in her power, to prove that her lights were sufficient, or that there was no such negligence (*l*). "The

(*h*) This seems to follow from the decision in *Mayor, &c. of Colchester* v. *Brooke*, 7 Q. B. 339. As to the right to bring up in a public navigable channel, see *Anonymous Case*, 1 Campb. 516, note. As to the liability for damages caused by an unlawful obstruction of a highway on land, see *Harris* v. *Mobbs*, 3 Ex. D. 268; *Wilkins* v. *Day*, 12 Q. B. D. 110.

(*i*) 7 P. D. 217.

(*k*) *The Aleppo*, 35 L. J. Ad. 9.

(*l*) *The Swanland*, 2 Sp. E. & A. 167; *The John Harley* and *The William Tell*, 13 L. T. N. S. 413.

burden of proof should under all circumstances be thrown on those who have a peculiar knowledge of the subject and peculiar means of proving it which do not belong to the other party" (*m*).

Ship negligently causing loss to another where the wrongdoer is not herself in collision.

A ship that negligently compels another to alter her course, and to go into collision with a third ship, or to put herself ashore, and thereby suffer damage, is liable, both at law and in Admiralty, to the injured ship, and also to the third ship, if she suffers loss; and not the less so because she is not herself in collision (*n*).

Specific acts of negligence.

Many of the innumerable acts and omissions which cause collision have been the subject of decision in the courts with reference to the question of negligence. Infringement of the Regulations for preventing collisions at sea, carelessness, want of look out, and disregard of the practice of seamen, and of the ordinary rules of seamanship, are amongst the most frequent instances of negligence causing collision. The cases dealing with specific acts of negligence, both infringement of the Regulations for preventing collisions at sea, and neglect of the ordinary practice of seamen, are considered in a subsequent Chapter (Chapter XIV.); the cases as to the ordinary practice of seamen being collected under Art. 24, which expressly refers to the necessity of observing such rules of seamanship.

(*m*) *The Swanland*, 2 Sp. A. & E. 107, 109.

(*n*) *The Sisters*, 1 P. D. 117; *The Industrie*, L. R. 3 A. & E. 303; *The Batavier*, 1 Sp. E. & A. 378; 9 Moo. P. C. C. 286.

CHAPTER II.

STATUTORY PRESUMPTION OF FAULT.

Statutory presumption of fault in case of infringement of the Regulations.

It has been already stated that under certain circumstances an arbitrary rule of law requires the courts to hold a ship in fault for collision, although no negligence on her part contributing to the collision is proved. And it will be seen below that this rule applies, not only where negligence is not proved, but where it did not exist, and where those in charge of the ship were, as regards negligence, absolutely free from blame. The circumstances which bring this stringent, not to say harsh, enactment into operation, are as follows:—First, where, on the part of the ship sued, there has been an infringement of any of the Statutory Regulations for Preventing Collisions at Sea, which might by possibility have contributed to the collision; and, secondly, where the ship sued did not stand by to assist the other with which she had been in collision. The decisions upon the first of these enactments are so much more numerous and important than those illustrating the second, that it will be convenient to reverse the order in which they occur in the statute (36 & 37 Vict. c. 85, ss. 16, 17), and to consider the section of the Act (sect. 17) relating to infringement of the Regulations before that (sect. 16) which deals with failure to stand by.

36 & 37 Vict. c. 85, s. 17.

By 36 & 37 Vict. c. 85, s. 17, it is enacted as follows:—

"If, in any case of collision, it is proved to the Court before which the case is tried that any of the Regulations for preventing collision contained in or made under the Merchant Shipping Acts, 1854 to 1873, has been infringed, the ship by

which such Regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the Court that the circumstances of the case made departure from the Regulation necessary."

History of legislation upon the subject of infringement of statutory rules of navigation.

To understand the effect of this enactment it will be necessary to refer to previous legislation upon the subject. By 14 & 15 Vict. c. 79, s. 28, and afterwards by 17 & 18 Vict. c. 104, s. 298, it was enacted, in effect, that if a collision was occasioned by the non-observance of any of the rules as to lights or navigation contained in or made under those Acts, the owner of the ship by which the rule was infringed should recover no damages for injury to his ship, unless it was proved that the departure from the rule was necessary (*a*). The effect of these enactments was to abrogate the rule of the Admiralty, that a wrong-doing vessel shall recover half her loss if the other ship is also in fault, in the case of a vessel which had unnecessarily infringed the statutory rules. In each case the question had to be tried whether the infringement was negligence contributing to the collision. In *Tuff* v. *Warman* (*b*) and other cases (*c*) it was held, upon the construction of these

(*a*) The sections ran as follows:—14 & 15 Vict. c. 79, s. 28: "If in any case of collision between two or more vessels it appear that such collision was occasioned by the non-observance of either of the foregoing rules with respect to the passing of steamers, or" (the rules as to ships' lights made under the powers of the Act) . . . "the owner of the vessel by which any such rule has been infringed, shall not be entitled to recover any recompense whatever for any damage sustained by such vessel in such collision, unless it appears to the Court before which the case is tried that the circumstances of the case were such as to justify a departure from the rule," &c. The subsequent Act, 17 & 18 Vict. c. 104, s. 298, was as follows:—"If in any case of collision it appears to the Court before which the case is tried that such collision was occasioned by the non-observance of any rule, &c. . . . the owner of the ship by which such rule has been infringed shall not be entitled to recover any recompense whatever for any damage sustained by such ship in such collision, unless it is shown to the satisfaction of the Court that the circumstances of the case made a departure from the rule necessary." Under the latter Act, *The Juliana*, Sw. 20, was decided.

(*b*) 2 C. B. N. S. 740; 5 C. B. N. S. 573.

(*c*) *Morrison* v. *General Steam Navigation Co.*, 8 Ex. 733; *The Vivid*, 10 Moo. P. C. C. 472; *The Alival*, 1 Sp. 96; *The Telegraph*, *ib.* 427.

enactments, that though the plaintiff had infringed the Regulations, and by his negligence had brought the ships into danger, yet if the defendant could by reasonable care have avoided the collision, the plaintiff could recover. Where one ship, A., was in fault for not keeping a look out, and the other, B., was in fault for infringing the statutory rule, it was held that A. could recover half her loss, and that B. could recover nothing (*d*). But it was held that sect. 298 did not prevent the owner of cargo on board a ship infringing the statutory rule from recovering half his loss (*e*). The effect of these enactments, so far as they abrogated the Admiralty rule of division of loss, was probably not apprehended by the legislature (*f*).

The next alteration in the law was made by 25 & 26 Vict. c. 63, s. 29 (*g*). The effect of this enactment was to restore the Admiralty rule as to the division of damages where both ships are in fault, and a vessel guilty of an infringement of the Statutory Regulations was enabled to recover in the Admiralty Court (as she could previously to 14 & 15 Vict. c. 79) half her loss against a defendant vessel which was also in fault. The question whether a ship which had infringed a regulation applicable to the case was guilty of negligence contributing to the collision had still to be tried in every case (*h*).

The application of the doctrine in *Tuff* v. *Warman* prevented the above statutes from having the effect desired

See also *The Juliana*, Sw. 20; *The Fairy*, 1 Sp. E. & A. 298; *The Wansfell*, 1 Sp. E. & A. 271.

(*d*) *The Aurora*, Lush. 327.

(*e*) *The Milan*, Lush. 388.

(*f*) *The Swanland*, 2 Sp. E. & A. 110.

(*g*) "If in any case of collision it appears to the Court before which the case is tried that such collision was occasioned by the non-observance of any Regulation made by or in pursuance of this Act, the ship by which such Regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the Court that the circumstances of the case made a departure from the rule necessary." The wording of this section seems to have been suggested by a passage in the judgment of Cockburn, C.J., in *Tuff* v. *Warman*, *ubi supra*.

(*h*) Under this Act the following cases were decided: *The Fenham*, L. R. 3 P. C. 212; *The Bougainville*, L. R. 5 P. C. 316; *The Palestine*, 13 W. R. 111; *The Pyrus* and *The Smales*, Holt, 40; *The Pennsylvania*, *infra*, p. 64.

by those who framed them. Attention appears to have been called to the subject by the decision in *The Fenham* (*i*); and 36 & 37 Vict. c. 85, s. 17, the enactment now in force, was passed in consequence. The change in the language of this enactment was made with the following objects:— First, to take away the *ratio decidendi* in *Tuff* v. *Warman;* secondly, to render it unnecessary to have resort to an artificial rule as to the inference to be drawn from evidence (*k*); thirdly, to enable the courts to adjudicate upon collision cases without the necessity of determining upon conflicting evidence the question of fact, (often a nice one,) whether or no an infringement of a Statutory Regulation, applicable to the case, and that might by possibility have contributed to the collision, did, in fact, contribute to the collision (*l*); and, lastly, to increase the stringency of the Regulations (*m*). The statute, therefore, imposes on a vessel that has infringed a Regulation which is *primâ facie* applicable to the case, the burden of proving, not only that such infringement did not, but that it could not, by possibility, have contributed to the collision (*n*), and it is the

(*i*) See *per* Lord Blackburn in *The Khedive*, 5 App. Cas. 876, 892; and perhaps by *The Bougainville* and *The J. C. Stevenson*, L. R. 5 P. C. 316 (1872, 1873).

(*k*) As in *The Fenham*, L. R. 3 P. C. 212. These two reasons for the alteration in the law are given by Lord Blackburn in *The Khedive*, 5 App. Cas. 893.

(*l*) *The Fanny M. Carvill*, 13 App. Cas. 455, note; 2 Asp. Mar. Law Cas. 565; in Court below, *ib.* 478; L. R. 4 A. & E. 417, 422; cited by Lord Blackburn in *The Khedive*, 5 App. Cas. 876, 893; approved and followed by the Privy Council in *The Lapwing*, 7 App. Cas. 512; *The Hibernia*, 2 Asp. Mar. Law Cas. 454.

(*m*) *Per* Lord Watson, *The Khedive*, 5 App. Cas. 876, 901.

(*n*) In Canada the course of legislation upon this subject has followed that of England. 31 Vict. c. 58, s. 6 (Canada) was to the same effect as 17 & 18 Vict. c. 104, s. 298, and in *The Eliza Keith* and *The Langshaw*, 3 Quebec, L. R. 143, it was held that a ship that had infringed the Canadian statutory rules could recover nothing, though the other ship was also in fault; but that the cargo-owner could recover half his loss; cf. *The Milan*, *ubi supra*. See also the following Canadian cases:—*The Aurora*, 2 Stuart's V. Ad. Rep. 52; *The Arabian*, *ib.* 73; *The Germany*, *ib.* 158; *The Quebec* and *The Charles Chaloner*, 19 Low. Canada Jurist, 197. The subsequent Canadian statute 43 Vict. c. 29 (following the English Act 25 & 26 Vict. c. 63), restores the Admiralty rule as to division of loss where the statutory rules are infringed.

duty of the Court to inquire into the facts, in order to ascertain whether the infringement could possibly have contributed to the collision (*o*).

Cases decided under s. 17, *The Englishman.*

In the following case it was held that the infringement of a Regulation clearly applicable to the case did not, under sect. 17, prevent the vessel guilty of the infringement from recovering, because the infringement could not by possibility have contributed to the collision. *L'Étoile* was a French trawler, close-hauled on the port tack, just going to shoot her nets, and going two or three knots. The night being fairly clear, *The Englishman*, an English sailing vessel, was seen coming towards her with the wind free. *L'Étoile* had a bright light at her masthead. Her side lights were waved by hand on deck, but failed to attract the other ship's notice. *The Englishman* came on and struck *L'Étoile* on the port side. On the part of *The Englishman* it was alleged that nothing was seen or heard of *L'Étoile* until she struck her. It was held by the Admiralty Court that there was no look-out on board *The Englishman*, and that the absence of lights on board *L'Étoile* could not have contributed to the collision; that sect. 17, therefore, did not apply, and *The Englishman* was solely in fault (*p*).

The Fanny M. Carvill was before the Court in *The Englishman*, and the decision in the latter case was expressly stated by the Court to be in conformity with that of the Privy Council. It appears to have been considered by the Court that the admission by *The Englishman* that nothing was seen of *L'Etoile* until the moment of the collision was equivalent to an admission that the absence of side-lights on board the latter could not, by possibility, have contributed to the accident.

In *The Lapwing* (*q*), a steamship under way was held in

(*o*) *The Duke of Buccleugh*, 15 P. D. 86; *The Hermod*, 62 L. T. N. S. 670.

(*p*) *The Englishman*, 3 P. D. 18; see *The Chusan*, 5 Asp. M. C. 476.

(*q*) 7 App. Cas. 512.

fault under sect. 17 for having, some four minutes or more before the collision, hauled down her masthead light, although her side light was seen by the other vessel for some time before the collision.

In *The Imbro* (*r*), a sailing ship lying becalmed, and nearly broadside on to a steamship coming up channel, was held in fault, under sect. 17, because she had a white light lashed to her taffrail, and visible to an approaching steamship.

In *The Main* (*s*) a sailing ship was held in fault under the same section for not exhibiting a stern light to an overtaking steamship.

In *The Tolka* (*t*) a schooner was held in fault under the same section because, being at anchor with her mainsail scandalized (half lowered), her riding light might possibly have been hidden from the steamship that fouled her.

Where a Regulation which is material to the case is proved to have been infringed, as, for example, where one of the lights of the ship sued, which was open to the other ship, is proved to have been insufficient to satisfy the statute (*u*), the onus is on the ship carrying the improper light to show, if she can, that the departure from the Regulations was necessary (*x*). In the absence of such proof she will be held to be within the penalty of sect. 17 (*y*). If she alleges the other ship to be also in fault, it lies on her to prove, if she can, that it was not her fault alone that caused the collision (*z*).

A vessel (*a*) sailing from Dieppe some days before the Regulations of 1880 came into force was, under sect. 17,

(*r*) 14 P. D. 73.
(*s*) 11 P. D. 132.
(*t*) Ad. Div. 14th Dec. 1886.
(*u*) *The Duke of Buccleugh*, 15 P. D. 86.
(*x*) *The Memnon*, 59 L. T. N. S. 289; 62 *ib.* 84; see esp. per Lord Herschell, at p. 85, *infra*, p. 53.
(*y*) See *The Hibernia*, 2 Asp. Mar. Law Cas. 454; *The Arklow*, *Emery* v. *Cichero*, 9 App. Cas. 136; *The Vera Cruz*, 9 P. D. 88, *infra*, p. 44; and *infra*, pp. 44—46, as to ships in fault, under sect. 17, for improper lights. *The Fenham*, L. R. 3 P. C. 212, is a similar case under 25 & 26 Vict. c. 63, s. 29.
(*z*) *The Arklow*, 9 App. Cas. 136.
(*a*) *The Pansewitz*, *semble*, a foreign ship.

held in fault for a collision, because she was not sounding and was not provided with a mechanical fog-horn. There was no proof that a mechanical horn could not have been procured at the port from which she sailed (*b*). But where a foreign ship came into the Mersey without having on board a second riding light, as required by the Mersey Rules (*c*), and a collision occurred before the master, who had gone ashore to get one, had returned to the ship, it was held that the circumstances made a departure from the Regulations necessary within the meaning of 36 & 37 Vict. c. 85, s. 17 (*d*).

The Duke of Buccleugh.

The Vandalia, a full rigged ship, close hauled upon the starboard tack, and heading E. $\frac{3}{4}$ S., was run into on her port side in the English Channel by *The Duke of Buccleugh* steamship, outward bound. The port light of *The Vandalia* was so fixed as to be partially obscured by her foresail to an observer right ahead, but so as not to be obscured at all to an observer one-and-a-half points on her port bow. Butt, J., considering that the *Fanny M. Carvill* precluded him from going into nice questions of fact, held, without deciding anything as to the relative positions of the two ships before the collision, that *The Vandalia* was in fault under s. 17. The Court of Appeal reversed this decision, holding that the Court must decide whether the admitted infringement of Art. 6 could possibly have contributed to the collision; and that *The Duke of Buccleugh* never was a-head of *The Vandalia*, or in such a position that *The Vandalia's* light could have been in any way obscured to her. Lord Esher, M.R., pointed out that *The Fanny M. Carvill* did not preclude the Court from going into the question of fact as to the relative courses and positions of the ships before the collision; the effect of that case was merely to throw upon the ship, by which the

(*b*) *The Love Bird*, 6 P. D. 80.
(*c*) See p. 570, below.
(*d*) *The Calypso* and *The Mississippi*, Ad. Ct. 7th, 8th, and 9th March, 1878; Mitch. Mar. Reg.

Regulations were infringed, the burden of proving that the infringement could not have contributed to the collision. That burden, in the case before them, *The Vandalia* discharged (*e*).

In *The Bredalbane* (*f*) a brig was being overtaken by a full-rigged ship. The brig did not show astern either a white light, or a flare, in compliance with Art 11, but her binnacle light was visible over her stern. It was held by Sir R. Phillimore that the infringement of Art. 11 could not by possibility have contributed to the collision, and that the brig was not in fault under sect. 17. There is some difficulty in reconciling this decision with the cases above cited. The collision appears to have been partly caused by the crippled condition of the ship owing to some of her canvas being carried away; perhaps for that reason the absence of the stern light may have been considered immaterial.

Regulations in force in the Mersey sea channels (*g*) require two riding lights to be exhibited, the forward, or bow light, not more than 20 feet above the ship's hull, and the after one at double the height of the former. A vessel was held in fault under sect. 17 because her after light was, at most, 18 feet above the deck, whilst the forward light was 12 feet above the deck, and another vessel because both her lights were nearly the same height, about 20 to 22 feet above the deck (*h*).

The cases above cited show that the words of sect. 17, "any of the Regulations," are not to be construed literally; that it is not an infringement of *any* Regulation that will bring the section into operation, but only an infringement of a Regulation "which was in the circumstances applic-

The Regulation which is infringed must be one material to the case.

(*e*) *The Duke of Buccleugh*, 15 P. D. 86.
(*f*) 7 P. D. 186.
(*g*) Under 37 & 38 Vict. c. 52.
(*h*) *The Vera Cruz* (No. 1), 9 P. D. 88. This case was reversed upon another point, 9 P. D. 96; *The Hermod*, 62 L. T. N. S. 670.

able" (*i*). In *The Fanny M. Carvill* (*supra*) it was held that *The Peru* was not in fault under sect. 17 because her screens were seven inches short of the statutory length (three feet), it being clear that her lights were not in fact seen across her bow.

A Regulation such as Art. 18, of which the object is not only to prevent collision but to minimise its effects (*k*), may, it seems, be infringed after the collision becomes inevitable, or where it is from the first inevitable. For such an infringement the ship would probably be "deemed to be in fault" under sect. 17, though *ex hypothesi* it could not have contributed to the collision.

Infringement, to what extent will bring a ship within the penalty of s. 17.

A more difficult question is—What is such an infringement of a Regulation as will bring a ship within the penalty of sect. 17? In a case under 17 & 18 Vict. c. 104, it was doubted whether the disabling or penal section (sect. 298) of that Act applied where the helm was ported a little, but not sufficiently to avert collision (*l*). Under the present enactment it could scarcely be contended that an insufficient alteration of the helm, or an infringement, even to the smallest extent, of one of the steering rules which was applicable to the case could not, by possibility, have contributed to the collision (*m*). In such a case sect. 17 would, as pointed out by Lord Blackburn in *The Voorwaarts* and *The Khedive* (*n*), exclude the application of the well-known doctrine of *Davies* v. *Mann* (*o*), which was applied in *Tuff* v. *Warman* (*p*).

Carrying a wrong light. The Talbot 7 Asp. 37

A Regulation is not infringed until there is an opportunity

But a Regulation is not infringed within the meaning of sect. 17 if those in charge of the vessel did not in fact know, and could not, without more than ordinary skill,

(*i*) *Per* Lord Watson, *The Voorwaarts* and *The Khedive*, 5 App. Cas. 876, 901.

(*k*) See *per* Lord Watson, 5 App. Cas. 903, 904.

(*l*) *The Bothnia*, Lush. 52.

(*m*) See *The Arratoon Apcar*, 15 App. Cas. 37, 41; see *infra*, p. 54.

(*n*) 5 App. Cas. 876, 892.

(*o*) 10 M. & W. 546.

(*p*) *Ubi supra*. See, however, *per* Butt, J., in *The Vera Cruz*, 9 P. D. 88, 94, as to the application of *Davies* v. *Mann*.

care, and nerve, have known, that the Regulation had come into operation. If by a wrong manœuvre one vessel suddenly causes risk of collision to another, the latter will not be held in fault under sect. 17 unless there is time for those in charge of her, being seamen of ordinary care, skill, and nerve to appreciate the situation, and unless also there is opportunity for them to comply with the Regulation. "When a sudden change of circumstances takes place, which brings a Regulation into operation, though the thing prescribed by the Regulation is not done by the person in charge, yet the Regulation can hardly be said to be infringed by him, till he knows, or ought to have known, and but for his negligence would have known, of the change of circumstances" (*q*). So in *The Theodore H. Rand* (*r*), it was held that sect. 17 did not apply where the fact of a particular Regulation being applicable could not with ordinary care have been known. of complying with it.

But this doctrine must be applied with caution, for in the same case in which the above dictum of Lord Blackburn occurs, the House of Lords held that there may be an infringement of the Regulations within the meaning of sect. 17, although those in charge of the ship do all that could be expected of seamen of ordinary skill and nerve, and although they have been guilty of no act which at common law, and apart from sect. 17, would amount to negligence.

The circumstances in this case, *The Voorwaarts* and *The Khedive* (*s*), were as follows:—The two vessels, ocean steamships of 3,000 and 3,740 tons respectively, were approaching each other at night without risk of collision on nearly opposite and parallel courses, the green light of *The Voorwaarts* and *The Khedive*.

(*q*) *Per* Lord Blackburn, *The Voorwaarts* and *The Khedive*, 5 App. Cas. 876, 894; *The Emmy Haase*, 9 P. D. 81. Cf. *per* Brett, M. R., in *The Beryl*, 9 P. D. 137. *The Elphinstone*, Ad. Div. 27th May, 1887, was decided by Sir J. Hannen in accordance with these cases.

(*r*) 12 App. Cas. 247. See also *per* Lord Herschell in *The Memnon*, 62 L. T. N. S. 84, 85.

(*s*) 5 App. Cas. 876.

The Voorwaarts and *The Khedive.*

each being visible to the other on her starboard bow. At this time both vessels were going at full speed. When the vessels were somewhat less than a mile apart *The Voorwaarts* ported and showed her red light to *The Khedive.* This was a wrong manœuvre, and caused risk of collision. Thereupon the captain of *The Khedive*, without easing his engines, put his helm hard-a-starboard, and at the same moment gave the order to stand by the engines. One minute and a half afterwards he put his engines full speed astern. The collision occurred a minute and a half after this. The engines at the moment of the collision were going full speed astern. They ought to have been stopped and reversed as soon as the red light of *The Voorwaarts* appeared, at the moment when the order to put *The Khedive's* helm hard-a-starboard was given. The absolutely right manœuvre was therefore not adopted by *The Khedive*, and it was held by the House of Lords (Lords Blackburn, Watson, and Hatherley) that Art. 16 (of the Regulations of 1863) having been infringed without necessity, *The Khedive* was in fault under sect. 17. In the Court of Appeal it had been held that though the captain of *The Khedive* was wrong in not stopping and reversing at the moment when *The Voorwaarts'* red light was seen, yet that his error did not prove him to be deficient in ordinary care, skill, or nerve, and that, therefore, the collision not having been caused by negligence of those on board *The Khedive*, the owners of *The Voorwaarts* were alone liable. In the House of Lords it was held that, *The Khedive* having been within the operation of Art. 16, and not within the exceptions of Art. 19, or within the exception of the concluding words of sect. 17, she was by the words of that section to be deemed to be in fault, and that the question whether or no her captain had been in fact guilty of negligence was immaterial. *The Voorwaarts*, which by porting had brought about risk of collision in the first instance, and had kept her engines going at full speed

up to the moment of collision, was held in fault both in the Court of Appeal and in the House of Lords.

The decision in *The Voorwaarts* and *The Khedive* was, shortly, this: that where A. is approaching B. so as to involve risk of collision, and a collision may be avoided if A. stops and reverses, and not otherwise, if A., having time to do so, does not stop and reverse, she is in fault under sect. 17. It may be that the case is not an authority for any wider proposition than this; but it is clear that the *ratio decidendi* and certain *dicta* in the case point to a more extended operation of sect. 17. The learned lords appear to have considered that the policy of the legislature, as shown by the enactment of sect. 17, was to substitute a rigid adherence to the Regulations for the discretion as to complying with the Regulations which a seaman was, under the previous law, at liberty to exercise. It seems to have been thought that a justification for the harshness of the new enactment was to be found in the number of collisions which would be avoided if a rigid and almost mechanical adherence to the Regulations was substituted for the uncertainty which is inseparable from an application depending upon the discretion of seamen (*t*).

Such appears to have been the view taken by the House of Lords of the effect of sect. 17; and such clearly was the *ratio decidendi* in *The Voorwaarts* and *The Khedive*. But, as stated above, the facts of that case did not call for a decision as to the effect of sect. 17, where the infringement of the Regulations was, though unsuccessful as regards averting collision, not only not negligent, but the only or the best chance of escaping collision.

In *The Benares* (*u*) the Court of Appeal was called upon to decide what in such a case is the effect of sect. 17 as *The Benares.*

(*t*) Whether it is desirable, or possible, by Act of Parliament to fetter the exercise of a seaman's discretion in the throes of a collision seems more than doubtful. See *per* Lindley, L. J., in *The Memnon*, 59 L. T. N. S. at p. 291.

(*u*) 9 P. D. 16, followed in *The Sapphire* and *The Girdleness*, Ad. Ct. Feb. 27th, 1884.

The Benares. applied to the corresponding articles (Arts. 18 and 23) of the Regulations of 1880. The Court held, that *The Voorwaarts* and *The Khedive* did not apply, and that a ship will not be held in fault under sect. 17 because her captain does not comply with the letter of the Regulations, if such non-compliance is the only chance of escaping collision. In such a case the Court held that departure from the rules is "necessary in order to avoid immediate danger" within the meaning of Art. 23, and that therefore sect. 17 does not apply. The facts in *The Benares* were peculiar, the collision having been caused mainly by *The Benares* not having a red light exhibited on her port side, and having very shortly before the collision exhibited a green light on that side. The following passage is from the judgment of Brett, M.R.:—

"When *The Benares'* green light, and the green light alone, was seen, *The Gerarda* did no wrong by starboarding, for it was impossible, as it was then disclosed, for her to see how immediate was the then danger of collision. The vessels, however, eventually came so close to each other that the actual position of things was discovered, the port side of *The Benares* without a red light becoming visible to those on *The Gerarda*. Under these circumstances what was the master of *The Gerarda* to do? By Art. 18, if there was nothing else in the circumstances, he ought to have stopped and reversed. But the rules of navigation are contained, not in one article, but in all the articles, and Art. 23 is as much to be observed as Art. 18. The navigation of vessels is to be conducted with a regard to both of them. As I understand one part of *The Khedive*, if *The Benares* had put *The Gerarda's* officer in such a position that every reasonable man would have done what the officer of *The Gerarda* did, yet if the Court could not come to the conclusion that the case was brought within Art. 23, *The Gerarda* would be held likewise to blame. But in this case the question is whether it is brought

within Art. 23 and taken out of Art. 18? Was the necessity of the case such, and were the circumstances so special, that they rendered a departure from Art. 18 necessary? We are advised that these vessels were so placed that at the time when, under ordinary circumstances, Art. 18 would have been applicable, the position was such that the only chance of escape was for *The Gerarda* to starboard and continue full speed ahead. There was, therefore, a necessity within the meaning of Art. 23 for a departure from the rule laid down in Art. 18, and the facts take the case out of Art. 18. But then it has been argued that the danger referred to in Art. 23 is not the danger to either of the vessels approaching each other, but [to] some outside danger. The decision of the House of Lords in *The Khedive* gives no countenance to any such contention as this, and there is nothing in that case to show that the present case is not within the meaning of Art. 23." *The Benares.*

The judgments of Baggallay and Bowen, L.JJ., are to the same effect. The following passage is from that of Bowen, L.J.: "As to the law, *The Khedive* decided that it was no answer when the Rules had been infringed to say that a master had acted from the best of motives and according to the best of his ideas; for the law says, not that the master is to do what he believes to be best, but that the Regulations are to be obeyed. The question then arises, whether in this case the Rules have been disobeyed. The provisions of Art. 18 are plain, and if that article stood alone it might be said that it had been infringed. But we must look also to Art. 23, which is to be read with Art. 18. The House of Lords points out that both are to be read by the light of sect. 17 of the Merchant Shipping Act, 1873. Therefore we must see if the two articles taken together have been infringed; and it must be shown to the satisfaction of the Court, if there has been an infringement, that the circumstances of the case made a

departure from the Regulations necessary. It is not enough, perhaps, to show that what the captain did was reasonable and advisable; it must be shown to be necessary. Mr. Hall argued that success alone could justify a departure from Art. 18. With that I do not agree. Then he further says there must be a risk other than that of collision alone—some peril by sea or from the land—to justify a departure from the Rule. But this would lead to all sorts of absurdities. In truth, unless some reasonable force is given to Art. 23, and to the exception it contains, a captain will have to sail with his eyes open into the jaws of death. If he obeys Art. 18, let us assume that it is certain death for his passengers and crew, that he has only one chance still open to him, and that by disobeying the particular Rule. Such a case would surely be one in which a departure from the Rules becomes necessary; otherwise a captain's duty would be to obey Art. 18, and go cheerfully to the bottom of the sea with his ship and all on board, sooner than take the one chance of safety still remaining to him. Such an interpretation of the Regulations was never, in my opinion, intended by the House of Lords. I am of opinion that a departure from Art. 18 is justified when such departure is the one chance still left of avoiding danger which otherwise was inevitable."

The Memnon.

In *The Memnon* (*x*), on the other hand, it was held that necessity for departure from the rules had not been established; and the principle which should guide the Court in determining whether in any case the evidence establishes such necessity is clearly stated. In that case, the steamships *San Salvador* and *Memnon* were approaching one another on nearly crossing courses, and *The San Salvador* having *The Memnon* on her starboard bow, it was the duty of the former to keep out of the way of the latter, and of the latter to keep her course. *The San Salvador*

(*x*) 59 L. T. N. S. 289; 62 *ib.* 84.

took no step to avoid collision until within three ship's lengths of *The Memnon*, when she starboarded, and thereby rendered collision imminent, and she was, accordingly, without difficulty found to blame. *The Memnon* kept her course and speed until *The San Salvador* starboarded, when she stopped her engines. At the trial, the Trinity Brethren advised Butt, J., "that the officer in charge of *The Memnon* was not justified, as a sailor, in supposing, until he was within three ship's lengths of *The San Salvador*, that *The San Salvador* would keep out of the way, and could do so without difficulty." In the Court of Appeal the assessors agreed with this opinion, but in answer to a further question advised the Court, "that if *The San Salvador* had kept the course which she was keeping, without porting or starboarding, she would have gone a length and a half astern of *The Memnon*." Notwithstanding this, the Court of Appeal, affirming the judgment of Butt, J., held that *The Memnon* was to blame for not stopping sooner in compliance with Art. 18, on the ground that the officer in charge of her was not justified in assuming, under the circumstances, that "*The San Salvador* would do what was right," and this decision was, in turn, affirmed by the House of Lords. Lord Herschell, in addressing the House, used the following language: "When once it is shown that it was brought home, or ought to have been brought home, to the mind of the master of a vessel, that the courses upon which the ships were approaching, and the circumstances, involved risk of collision, the onus is thrown upon him of justifying his not doing that which the rule prescribes. . . . . The question whether a departure was necessary or not must, no doubt, be determined by the Court; but it must be determined upon the point being raised, and upon some evidence being tendered to the Court, to show that to have followed the rule would have either created that very risk of collision, which it was the purpose of the rule to avoid, or have increased instead of

diminished the risk of collision." Again, "what must be looked at is the risk as a whole. In order to excuse the master for his non-compliance with the rule, you must show that under all the circumstances, and considering all the possibilities, the total risk would have been greater if he had slackened speed than it would have been if he had not complied with the rule."

Breaking down of fog-horn.

The breaking down of a mechanical fog-horn has been held to make a departure from the Regulations necessary, and a ship sounding a mouth-horn under such circumstances was held not to be in fault under sect. 17 (*y*).

Fixing of ships' lights; a reasonable compliance with the Regulations required.

It appears that what the law requires in respect of the fixing and mechanical details of ships' lights is a reasonable compliance with the Regulations. A very small departure from the letter of the Regulations on these points is not an infringement within the meaning of sect. 17. This was the view taken by Butt, J., in *The Fire Queen* (*z*). There an obscuration by the starboard cathead of the green light, to the extent at the distance in question of an arc of $2\frac{1}{2}$ or 3 degrees, was held not to be an infringement within sect. 17. "What we must look to is whether there is a reasonable compliance with the Regulations." The learned judge held also that the obscuration did not and could not have contributed to the collision; but the value of the decision upon the first point is not, it is submitted, thereby lessened. Having regard to the class of people for whose guidance the Regulations are framed, and by whom they are worked, and also to the circumstances under which they are worked, it is difficult to suppose that the legislature could have intended by sect. 17 to enforce anything more than a reasonable compliance with the Regulations as to the carrying and fixing of lights. As regards the steering and sailing rules, the decision in *The Khedive* (*a*) shows that the smallest infringement of them will be fatal.

(*y*) *The Chilian*, 4 Asp. Mar. Law Cas. 473.

(*z*) 12 P. D. 147. Cf. *infra*, p. 377, note (*nn*).

(*a*) 5 App. Cas. 876.

Whether s. 17 applies where the collision is from the first inevitable;

There is some doubt whether, in a case where the collision is from the first inevitable, sect. 17 can apply at all. The Regulations are "for preventing collisions at sea," and it would seem that where a collision is from the first inevitable, the Regulations do not apply, and therefore cannot be infringed. Upon this point *The Buckhurst* (*b*) may be cited. *The Buckhurst*, a sailing vessel, at 6·30 p.m. parted from her anchors in a heavy gale, and, after driving over Cardiff Sands and disabling her rudder, came into collision at 8 p.m. with a vessel brought up to leeward of the sand. *The Buckhurst* had her riding light, but no other light, exhibited up to the time of collision. In the opinion of the Court the collision was an inevitable accident. It was argued that *The Buckhurst* must be in fault under sect. 17, because she had not exhibited her side lights, or the three red lights indicating that she was disabled. The case appears to have been decided upon the ground of inevitable accident. But it was held also that the circumstances of the case rendered a departure from the Regulations (as to lights) necessary; and further, that the non-carrying of the side or three red lights could not by possibility have contributed to the collision. It would seem, therefore, that, in the opinion of Sir R. Phillimore, sect. 17 may apply, though the collision is inevitable. In *The Voorwaarts* and *The Khedive* the opinions of the majority of the learned lords, and the judgments of the Court of Appeal and Admiralty Division, assume that the collision was not inevitable when *The Voorwaarts* first showed her red light. But Lord Blackburn (*c*) appears to have been of opinion that the collision was then inevitable, and that the manœuvre of *The Khedive*, though well adapted to lessen the force of the collision, being contrary to the law (Art. 18), placed her in the wrong under sect. 17. As pointed out above, there is some difficulty in supporting this view of the effect of that section.

(*b*) 6 P. D. 152.

(*c*) 5 App. Cas. 895.

Upon this point the doctrine of Lord Watson in the case of *The Khedive*, that the object of Art. 16 of the Regulations of 1863 (Art. 18 of those of 1884) was "to obviate the risk and minimize the results of collision" (*d*), is material. It is obvious that a Regulation having this object may well be infringed, where the collision, but not the damage, is from the first inevitable.

or where the infringement is in the agony of the collision;

There may be a question whether *The Voorwaarts* and *The Khedive* decides that a ship will be held in fault for a step taken in the agony of a collision, which step is an infringement of the Regulations not excused by Art. 23, but an infringement due entirely to the terror caused by imminent danger (*e*). In the case, for example, of a sailing ship going about—"altering her course"—under the bows of a steamship, where the latter has approached her so close as to frighten her into doing something, the question arises, whether the sailing ship will be held in fault under sect. 17? If she does not alter her course until the collision is inevitable it would seem that sect. 17 does not apply at all (*f*). If she stands on until the risk is so great that human nature can go no further, and then bears up or goes about, it would seem reasonable to hold that her change of course at such a moment is not an infringement of the Regulations, but rather an involuntary act caused by the imminence of the peril and the fault of the other ship.

or where previous negligence renders departure from the Regulations necessary.

It seems that sect. 17 would be held not to apply where a ship is unable to comply with the Regulations, although such inability is consequent upon, though not caused by, previous negligence on her part. If, for example, a ship loses one of her side lights in a collision caused by her own fault, and before she can replace it a second collision is caused by the absence of her side light, it seems that

(*d*) 5 App. Cas. 903, 904. And see 9 App. Cas. 651, 652. As to whether 25 & 26 Vict. c. 63, authorizes Regulations to be made with this object, see below, p. 342.

(*e*) The captain of *The Khedive* deliberately elected to depart from the Regulations.

(*f*) See *supra*, p. 55.

she would not be held in fault under sect. 17. Her inability to comply with the Regulations could hardly be said to be caused by the negligence which caused the first collision (*g*), and unless she has an opportunity of complying with the Regulations, she cannot be said to have infringed them (*h*). But a vessel will not escape the consequences of an infringement of the Regulations, though she was in fact unable to comply with them, if such inability was caused by want of a proper look-out, or other immediate negligence (*i*).

Whether a tug will be held in fault for an infringement by her tow.

It seems that a tug with a ship in tow has, under sect. 17, been held in fault for a collision between herself and a third ship, the tow having infringed a Regulation which could by possibility have caused the collision. A sailing ship with her side lights burning had in tow a pilot boat from which she had taken a pilot. The latter had her mast-head light burning. The sailing ship was, under sect. 17, held in fault for a collision with a third ship (*k*). This decision is not altogether satisfactory. It appears to rest upon the doctrine, which will be considered in a subsequent chapter, that a tug and her tow are in law for some purposes treated as one ship (*l*).

The same question as to the effect of sect. 17 arises where it is sought to make a ship in tow liable for an infringement of the Regulations by her tug (*m*).

Mere negligence, apart from the Regulations, is not within the penalty of s. 17.

The object of sect. 17 appears to be to enforce the observance of the Statutory Regulations, and not the rules of seamanship generally. Neglect to keep a look-out, or to observe any precaution required by the ordinary practice of seamen, would not, it is submitted, bring a ship within the penalty of sect. 17 (*n*). Nor would the infringement of

(*g*) See *The Douglas*, 7 P. D. 151.

(*h*) *Supra*, p. 46.

(*i*) See *The Emmy Haase*, 9 P. D. 81.

(*k*) *Mary Hounsell*, 40 L. T. N. S. 368; 4 P. D. 204; and see *The Giraffe*, 1 Pr. Ad. Dig. (3rd ed.), 234, 235.

(*l*) *Infra*, p. 185.

(*m*) See further as to this, *infra*, pp. 186 *seq.*

(*n*) By American Courts neglect of such precautions has been called an infringement of the Act of Con-

one of the Regulations which could not by possibility have contributed to the collision, although it may have augmented the damage (*o*), it is submitted, cause the ship so infringing to be deemed in fault.

Regulations of which an infringement brings the ship within s. 17.

It remains to consider what are "Regulations for preventing collision contained in or made under the Merchant Shipping Acts, 1854—1873," an infringement of which will bring a ship within the penalty of sect. 17. There can be no doubt that an infringement at sea of the General Regulations, which came into force on the 1st of September, 1884, and which have been substituted for previous Regulations made under the same Acts, will have the effect mentioned in the section. It has also been held that, by virtue of 37 & 38 Vict. c. 52, an infringement of the statutory rules in force in the sea channels and approaches to the River Mersey has the same effect (*p*). And a ship infringing rules made under 28 & 29 Vict. c. 125, s. 7 (Dockyard Ports Regulation Act, 1865), would, it seems, be deemed to be in fault under sect. 17.

The Solent Navigation Act, 1881, 44 & 45 Vict. c. 219 (Local), contains (sect. 8) a provision to the effect that a ship infringing any Regulation made under that Act shall be deemed to be in default, unless it is shown to the satisfaction of the Court that the infringement was necessary (*q*).

Effect of an infringement of local rules.

But sect. 17 does not apply to an infringement of rules, such, for example, as the Thames rules (*r*), made under a local Act, which does not incorporate the penal clause of the Merchant Shipping Acts. A ship infringing these

gress embodying the Regulations: *The Farragut*, 10 Wall. 334; *The Atlas*, 10 Blatchf. 459, 466.

(*o*) As in *The Margaret*, 6 P. D. 76 (Thames Rules); and see *Greenland* v. *Chaplin*, 5 Ex. 243, and pp. 55, 56, *supra*.

(*p*) *The Lady Downshire*, 4 P. D. 26; *The Vera Cruz*, 9 P. D. 88.

(*q*) See below, p. 571, as to rules under this Act.

(*r*) *The Harton*, 9 P. D. 44. In *The Swansea*, and *The Condor*, 4 P. D. 115, this question was considered but not decided. The opinion of the learned judge in the Court below seems to have differed from that of the Court of Appeal.

rules will not be held in fault unless the infringement did, in fact, contribute to the collision.

An infringement of rules, such as the Mersey river rules, made in exercise of the powers given to local authorities by 25 & 26 Vict. c. 63, s. 32, will, it seems, cause a ship to be held in fault under the enactment above referred to. By sect. 32 it is provided that such rules shall, "so far as regards vessels navigating such waters, have the same effect" as the rules contained in the Schedule (C) to the Act. It would seem that they are "made under" the Act within the meaning of sect. 17. In a case under the Humber rules it was so decided (*s*); and in a case under the Mersey river rules it was assumed by Butt, J., that sect. 17 applied (*t*).

It seems that, where local rules are in force, the operation of the General or Sea Regulations is not thereby excluded, except so far as they conflict with the local rules. Thus, in the Clyde, where local rules are in force, a vessel was held in fault under sect. 17 for not having stopped and reversed her engines in compliance with the Sea Regulations (*u*).

Whether s. 17 applies when the collision is not at sea.

An important question may, however, arise as to the effect of sect. 17 in cases where the collision is not at sea. It may be contended that in a river where no local rules are in force, although ships are required to navigate in accordance with the general Sea Regulations (*x*), failure to do so would not bring a ship within the penalty of sect. 17, inasmuch as the Regulations are expressly binding only at sea. In a case, however, where the collision was in the Humber, near the Flat Holme Sand, it was held that one of the ships was in fault under sect. 17 for an infringe-

(*s*) *The Ripon*, 10 P. D. 65, *infra*, p. 566.

(*t*) *The Fire Queen*, 12 P. D. 147.

(*u*) *Little* v. *Burns*, *The Owl* and *The Ariadne*, 9 Sess. Cas. 4th Ser. 118. It appears that in this case the ship was in fault upon the facts, so that the application of sect. 17 was unnecessary.

(*x*) See *infra*, p. 343.

ment of the Regulations (*y*). And in Scotland a vessel was held in fault for an infringement of the Regulations in the River Clyde, where local rules of navigation are in force (*z*).

Presumption of fault where the ship fails to stand by and assist. 36 & 37 Vict. c. 85, s. 16.

The other case where damages may be recovered without proof or existence of negligence on the part of the ship sued, is when she fails to stand by and assist the ship with which she has been in collision. By 36 & 37 Vict. c. 85, s. 16, it is enacted as follows:

36 & 37 Vict. c. 85, s. 16.

"In every case of collision between two vessels it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without danger to his own vessel, crew and passengers (if any), to stay by the other vessel until he has ascertained that she has no need of further assistance, and to render to the other vessel, her master, crew and passengers (if any), such assistance as may be practicable and as may be necessary in order to save them from any danger caused by the collision; and also to give to the master or person in charge of the other vessel the name of his own vessel, and of her port of registry, or of the port or place to which she belongs, and also the names of the ports and places from which and to which she is bound.

"If he fails so to do, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default.

"Every master or person in charge of a British vessel who fails without reasonable cause to render such assistance or give such information as aforesaid shall be deemed guilty of a misdemeanor (*a*), and if he is a certificated officer an inquiry into his conduct may be held and his certificate may be cancelled or suspended."

(*y*) *The Germania*, cited Maude & Pollock on Shipping, 4th ed. 606, note (*i*); and see *The Swanland*, 2 Sp. E. & A. 107.

(*z*) *Little* v. *Burns*, *The Owl* and *The Ariadne*, 9 Sess. Cas. 4th Ser. 118.

(*a*) Punishable by fine of 100*l.* or imprisonment for six months: 17 & 18 Vict. c. 104, s. 518.

The temptation for a ship to run away from another with which she has been in collision by her own fault, in the hope of escaping detection, has been found in many cases stronger than the dictates of humanity. "Standing by" was first made a statutory duty by 25 & 26 Vict. c. 63, s. 33 (*b*). Previous to that Act, however, the duty of each ship to render assistance to the other was distinctly recognized by the Admiralty Court, and failure to stand by a ship injured in a collision was punished by compelling the defaulting ship to pay the costs of the suit, although she was free from blame in other respects, and successful in the suit (*c*).

However free from blame a ship may be in other respects, and however wanton the collision on the part of the other ship, the law requires each to stand by the other. If either ship fails to do so, in the absence of proof to the contrary (*d*), she will be held to be in fault for the collision.

On whom the statute casts the duty to stand by.

The "person in charge" mentioned in sect. 16 is the master, although at the time of the collision the ship is in charge of a pilot (*e*). If the master is below, the duty to stand by lies on the mate or other person in charge of the deck, until the master comes on deck; if life or property is still in danger, it is then transferred to the master (*f*). Where a collision occurred between a ship in tow and a third ship, it was said by Sir R. Phillimore that the law required the tug to stand by the ships in collision (*g*).

What is reasonable cause

The penalty for not "standing by" is strictly enforced.

(*b*) It was introduced into the statute by Lord Kingsdown: see *The Hannibal* and *The Queen*, L. R. 2 A. & E. 53, 56; 168 Hansard's Parl. Deb. 281.

(*c*) *The Celt*, 3 Hag. Ad. 321.

(*d*) In *The British Princess* and *The Sedmi Dubrovacki*, Ad. Ct. March 11—14th, 1879, there was such "proof to the contrary," and a ship which left the other, with which she had been in collision, recovered damages for the collision.

(*e*) *The Queen*, L. R. 2 A. & E. 354.

(*f*) *Ex parte Ferguson and Hutchinson*, L. R. 6 Q. B. 280.

(*g*) See *The Hannibal* and *The Queen*, L. R. 2 A. & E. 53; the three last-mentioned cases were decided under 25 & 26 Vict. c. 63, s. 33.

for failure to stand by.

A ship must obey the law although there is some risk to herself, and the other appears to be in no danger. A steamship was held in fault for not standing by another with which she had been in collision, although, being in narrow waters, and herself of great length (450 feet), she could not do so without risk of going ashore, and although she had hailed another ship, better able to assist, to do so (*h*).

A barque was held in fault under sect. 16, though her fore compartment to the collision bulkhead was full of water, and she was five or six feet by the head. The collision was in the channel, four or five miles from land, and the weather was bad (*i*).

So where the ship is unable literally to comply with the law, and, without fault on her own part, parts company with the vessel with which she has been in collision, those on board her must do their best to render assistance. In such a case, if the collision is at night, and she sees rockets or other signals of distress from the other vessel, it is her duty, under sect. 16, to return them by similar signals, or in any way within her power. In *The Emmy Haase* (*k*) a vessel so neglecting to return signals of distress was held in fault for the collision under sect. 16.

Failure to stand by does not affect right to salvage.

Although a vessel which fails to render assistance to another with which she has been in collision breaks the law, it appears that her right to salvage remuneration, where she renders assistance to a ship with which she has been in collision by no fault of her own, is not affected by 36 & 37 Vict. c. 85, s. 16. In a case under 25 & 26 Vict. c. 63, s. 33, it was held that the right to salvage reward of a tug, whose tow was damaged in a collision with a third

(*h*) *The Adriatic*, 3 Asp. Mar. Law Cas. 16. The present Act is more stringent than former Acts (25 & 26 Vict. c. 63, s. 33; 34 & 35 Vict. c. 110, s. 9). Other cases under the Act of 1862 are *The Lucia Jantina* and *The Mexican*, Holt, 130; *The Queen of the Orwell*, 1 Mar. Law Cas. O. S. 300; *The Eliza* and *The Orinoco*, Holt, 98.

(*i*) *The Valleyo*, Ad. Div. 27th April, 1887.

(*k*) 9 P. D. 81.

ship, for which the latter was in fault, was not affected by the statutory enactment as to standing by (*l*).

Collision with boat.

The "standing by" section of 25 & 26 Vict. c. 63, was held to apply in the case of a collision with an open fishing-boat (*m*).

"Proof to the contrary"—*i. e.* that the collision was not caused by fault of ship failing to stand by.

It seems that where a collision is caused by the fault of a compulsory pilot, the shipowners are not liable, under sect. 16, by reason of the subsequent neglect by the master to stand by (*n*). In such a case there would seem to be "proof to the contrary" within the meaning of the second paragraph of sect. 16.

Application of ss. 16, 17 to foreign ships.

These enactments raising a statutory presumption of fault against (1) a ship which infringes the Regulations, and (2) a ship which fails to render assistance, apply to all ships, whether British or foreign, and whether the collision occurs in British or foreign waters or on the high seas (*o*). There is no express decision upon the point; but it has been assumed that sect. 17 applied to a British ship in collision with a foreign ship, whether in British waters (*p*) or on the high seas (*q*); and to a foreign ship (*r*) under the same circumstances.

The wording of 36 & 37 Vict. c. 85, s. 16, favours the contention that that part of the section which relates to the presumption of fault applies to foreign as well as British ships. Both sect. 16 and sect. 17, moreover, would probably be held to be rules of evidence or procedure, applicable to foreign ships as part of the *lex fori* (*s*).

(*l*) *The Hannibal* and *The Queen*, L. R. 2 A. & E. 53.

(*m*) *Ex parte Ferguson and Hutchinson*, L. R. 6 Q. B. 280.

(*n*) *The Queen*, L. R. 2 A. & E. 354.

(*o*) *The Megnet*, L. R. 4 A. & E. 417. See *per* Sir R. Phillimore in *Reg.* v. *Keyn*, 2 Ex. D. 63, 65. The doubt expressed by the Privy Council in *The Fanny M. Carvill*, 2 Asp. Mar. Law Cas. 565, 569, appears to be not well founded.

(*p*) *The Vera Cruz* (No. 1), 9 P. D. 88.

(*q*) *The British Princess* and *The Sedmi Dubrovacki*, Ad. Ct. March, 1878; *The Englishman*, 3 P. D. 18; *The Voorwaarts* and *The Khedive*, 5 App. Cas. 876; and see *infra*, p. 217.

(*r*) *The Magdeburgh* and *The Henry Willard* (an American ship), Ad. Div. 16th Jan. 1885, where the collision was on the high seas; *The Love Bird*, 6 P. D. 80, where, from the name of the ship deemed to be in fault (*The Pansewitz*), it would seem that she was foreign. The collision was at the entrance to the Skager Rack.

(*s*) See as to this, pp. 208, 216, 217, *infra*. In *Dowell* v. *General*

The application of sect. 17 to foreign ships is further considered in a subsequent chapter (*t*).

Enactments similar to sects. 16, 17, are in force in several of the British colonies (*u*).

Application of s. 17 to Queen's ship.

In one case a Queen's ship has been held in fault under sect. 17 (*x*). The question whether the Act applies to a Queen's ship does not appear to have been discussed or raised. It is submitted that it does not so apply (*y*).

Liability where ship deemed to be

Where a ship is deemed to be in fault under either sect. 16 or sect. 17, the owner will usually be liable at law,

Steam Nav. Co., 5 E. & B. 195, s. 28 of 14 & 15 Vict. c. 79, was held to be a rule of evidence.

(*t*) See *infra*, p. 223. There is no law in America corresponding to 36 & 37 Vict. c. 85, s. 17. The Supreme Court has declared that it will not "accept blindly an artificial rule which is to determine in all cases whether the navigator is liable to the charge of negligence in causing any damage that may happen:" *The Farragut*, 10 Wall. 334. But the burden is on a vessel which has infringed the Statutory Regulations to prove that the infringement did not contribute to the collision: *The Pennsylvania*, 19 Wall. 125; *The Ariadne*, 2 Bened. 472. If, however, such proof is forthcoming, a ship will recover full damages although she did not comply with the Regulations: 1 Parsons on Shipping (ed. 1869), 596, 597; *Chamberlain* v. *Ward*, 21 How. 548, 567; *The Grey Eagle*, 9 Wall. 505; *The Continental*, 14 Wall. 345; *The Sunnyside*, 1 Otto, 208; *The City of Washington*, 2 Otto, 31. And *Blanchard* v. *New Jersey Steamboat Co.*, 59 New York Rep. 292; and *Whitehall Transport Co.* v. *New Jersey, &c. Co.*, 51 N. Y. Rep. 369; and *Hoffman* v. *Union Ferry of Brooklyn*, 7 Amer. Rep. 435, are decisions of the State of New York Courts to the same effect. In *The Pennsylvania* a steamship and a sailing ship were in collision. The latter was not sounding her fog-horn, but was ringing a bell, though she was under way. The Supreme Court refused to admit evidence that the bell could be heard further than the horn, and held that the sailing ship was in fault for the collision. The following passage, which occurs in the judgment of the Court, shows that the law in America as to the effect of an infringement of the Regulations is identical with that of this country: "Where a ship, at the time of collision, is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the collision. In such a case the burden rests upon the ship of showing, not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been." The same ship was in this country held free from fault: see *The Pennsylvania*, 3 Mar. Law Cas. O. S. 477.

(*u*) Canada, 43 Vict. c. 29; see *The Clara Killam*, 2 Quebec L. R. 56; *The Govino*, 5 Quebec L. R. 57; Queensland, 46 Vict. No. 12; South Australia, 44 & 45 Vict. No. 237; Victoria, 28 Vict. No. 255; New South Wales, 25 Vict. No. 7; New Zealand, 41 Vict. No. 54; Prince Edward's Island, 30 Vict. c. 13, s. 2.

(*x*) *The Hochung* and *The Lapwing*, 7 Ap. Ca. 512.

(*y*) See 17 & 18 Vict. c. 104, s. 4; 25 & 26 Vict. c. 63, s. 1; 36 & 37 Vict. c. 85, s. 2.

and the ship herself in Admiralty proceedings *in rem*. But where the infringement is proved to have been the act of persons who are not the owner's servants, the liability is not so clear. In such a case, if the ship is under charter or demise, it seems that the ship may be liable in proceedings *in rem* (*z*), while the owner is not liable at law. If the infringement is the act of a compulsory pilot, it would probably be held that neither the ship nor her owners are liable under sect. 17 (*a*). In *The Milan* (*b*) it was held, that fault presumed by law does not affect owners of cargo, so as to prevent them from recovering from the owners of the other ship (*c*). in fault under s. 16 or s. 17.

But sect. 17 affects with the usual consequences of negligence persons on board the ship deemed to be in fault, whose duty it was personally, or by their agents, to comply with the Regulation which has been infringed. Thus, it was held, that the master of a schooner brought up in the Mersey with one of her riding lights in an improper position was, under sect. 17, guilty of negligence contributing to the collision; and that his widow, suing under Lord Campbell's Act, could not recover damages for his death (*d*).

Where a ship is deemed to be in fault under sect. 17, although there is no proof of negligence causing the collision, the rule of division of loss applies (*e*). And it is conceived that the case would be the same where sect. 16 is infringed. Rule of division of loss where ship deemed to be in fault.

(*z*) See *The Lemington*, 2 Asp. Mar. Law Cas. 475; *The Tasmania*, 13 P. D. 110; *infra*, pp. 90, *seq.*

(*a*) *The Hector*, 8 P. D. 218.

(*b*) Lush. 388; decided under 17 & 18 Vict. c. 104, s. 298.

(*c*) This was so held before *Thorogood* v. *Bryan*, 8 C. B. 115, had been overruled by *The Bernina*, 13 Ap. Ca. 1; see *infra*, p. 108.

(*d*) *The Vera Cruz* (No. 1), 9 P. D. 88. This case was reversed upon another point, 10 Ap. Ca. 59.

(*e*) *The Lapwing*, 7 Ap. Ca. 512; *The Khedive*, 7 Ap. Ca. 795; and see *infra*, p. 144.

CHAPTER III.

LIABILITY.

Persons liable; the actual wrong-doer.

THE person primarily liable in damages to the sufferer by collision is he by whose negligent act the loss was occasioned. The shipowner navigating his own vessel, the master, mate, pilot or other person in charge of the ship, who gave a wrong order to the helm (*a*), the helmsman who directed the ship's course wrongly, the seaman on the look-out who negligently failed to see and report the approach of the other vessel, may all be sued as wrong-doers, and are liable for damages (*b*).

An action was brought against a pilot on board a king's ship for injury to the plaintiff's ship by the king's ship. It was held by Lord Kenyon that, though the pilot might be obliged to act in obedience to the order of the lieutenant in command of the king's ship, yet the pilot would be liable, if the collision happened by his personal misconduct. Upon proof that the collision occurred by reason of an alteration of the helm ordered by the lieutenant, the plaintiff was non-suited (*c*).

Liability of master.

It has been said that the master is liable for the negligent and wrongful acts of his crew as well as for his own acts (*d*). His liability as carrier, unless specially limited,

(*a*) See *Stort* v. *Clements*, 1 Peake, 107.

(*b*) *Stort* v. *Clements*, *ubi supra*; *Smith* v. *Voss*, 2 H. & N. 97; *Lawson* v. *Dumlin*, 9 C. B. 54; were actions against pilots. As to the practice of the Admiralty Division in personal actions, see below, p. 316.

(*c*) *Stort* v. *Clements*, 1 Peake, 107.

(*d*) Story on Agency, §§ 314—317; Molloy, l. 2, c. 3, s. 13. And in America it has been so held: *Denison* v. *Seymour*, 9 Wend. 9.

may extend so far; but it does not appear to have been held in any case decided in this country that he is liable in tort for wrongful acts of the crew (*e*). For wilful injury to another ship by pilot or crew he clearly is not liable (*f*).

As regards the responsibility of the master when a pilot is on board, whether by compulsion of law or by the master's or owner's choice, it seems clear that for a collision caused by the fault of the pilot the master is not answerable if the pilot has been placed in charge of the ship properly and in the ordinary course of navigation (*g*).

No limitation of liability of the actual wrong-doer.

The statutory limitation of liability (*h*) does not apply to protect an owner, or a part owner, by whose actual fault or with whose privity the collision occurred. Such an owner is liable for full damages; and if the proceeds of the sale of the ship arrested, or if the statutory amount of the owner's liability, is insufficient to recompense the sufferer by the collision, the owner by whose actual fault or privity the loss was occasioned is liable for the deficiency (*i*).

It will be seen below (*k*) that in the case of a collision with one of her Majesty's ships, by the fault of those on board her, the actual wrong-doer is alone answerable in damages.

Liability of the ship-owner.

The actual wrong-doer, being commonly a seafaring man of small means, can seldom give adequate redress, and may be not worth suing. In such cases the substantial

(*e*) See *Aldrich* v. *Simmonds*, 1 Stark. 214; *Oakley* v. *Speedy*, 4 Asp. M. L. C. 134; *Blackie* v. *Stembridge*, 6 C. B. N. S. 894. The contrary has been held in a Victorian Court: *Claney* v. *Harrison*, 4 Victoria, L. R. 437 (L.); *Staccpole* v. *Betridge*, 5 Victoria, L. R. 302 (L.).

(*f*) *Boucher* v. *Noidstrom*, 1 Taunt. 568; *McManus* v. *Crickett*, 1 East, 106.

(*g*) Kent's Comm. vol. 3, § 176. As to the respective duties of master and pilot, see below, p. 243.

(*h*) See below, p. 167, as to the statute limiting owner's liability.

(*i*) See *The Triune*, 3 Hag. 114. In this case (decided under 53 Geo. 3, c. 159), after decree condemning the owner (who intervened in the suit) and his ship and freight, the ship was sold, and the proceeds were insufficient to pay the full amount of damages and costs. A monition was decreed against the owner, who was in charge of the ship at the time of the collision, to pay the deficiency, and, upon his failing to do so, he was imprisoned upon attachment.

(*k*) *Infra*, p. 102.

remedy is to be sought, either in Admiralty against the ship, or in a common law court against the employer of the actual wrong-doer. We propose to consider first the liability of the employer or master of the actual wrong-doer (*l*).

In most cases the owner of the ship is the employer of those on board and in charge of her, and is liable for their negligent acts. So generally is this the case that it has been held that, in the absence of proof to the contrary, those in charge of a ship will be presumed to be in the employment of her owners (*m*). And *primâ facie* the registered owners are the real owners of a ship. But the register is not conclusive evidence of ownership; and if it is shown either that the actual owner is a different person from the registered owner, or that the registered owner is not the employer of the crew or person causing the collision, the presumption as to the liability of the registered owner is rebutted, and the actual owner or other person employing the wrong-doer is alone liable.

The ship-owner is liable, not *quâ* owner, but only as employer of the actual wrong-doer.

It must be clearly understood that the liability for damage by a ship does not attach to her owner *quâ* owner. It is only as master or employer of the persons whose negligent act caused the damage that he incurs any lia-

(*l*) Whether by the civil law the shipowner was liable for a collision caused by the fault of the master or crew seems to be a disputed point. Bynkershoek, Quæst. Jur. Civ. l. 4, c. 23, contends that he is not liable: *ei (magistro) autem mandatum non est aliorum naves dolo vel culpâ obruere; quod si fecisset, ipse, quod dedit luat, non exercitor;* so also Bynk. Observationes Jur. Rom. l. 4, c. 16. On the other hand, Voet, ad Pandect. 14, 1, 7, makes the shipowner liable: *quod si deliquerit (magister) si quidem in ipso officio cui erat propositus, dum forte datâ operâ vel culpâ atque imprudentiâ manifestâ in navigium alienum impegit suum . . . exercitores ex quasi delicto teneri constat.* Huberi Prælect. Jur. Civ. 14, 1, 8; 3 Kent's Comm. 161; to the same effect. Cf. also, *per* Ware, J., *The Rebecca*, Ware, 188; *The Phebe*, *ibid.* 263, 268. The *exercitor* (charterer, for whose benefit the ship was worked) was generally liable for the acts of the master, and not the *dominus* (general owner). The law on the subject will be found D. 4, 9; D. 14, 1; D. 9, 2; D. 44, 7, 5; D. 45, 2, 3, 1; D. 47, 5, 1; J. 4, 3; Gaius, 3, 218, 219.

(*m*) See *Joyce* v. *Capel*, 8 C. & P. 370; *Hibbs* v. *Ross*, L. R. 1 Q. B. 534, and cases there cited; *Frazer* v. *Cuthbertson*, 6 Q. B. D. 93, 98; *Chasteauneuf* v. *Delange*, 7 App. Cas. 127.

bility. "The owner would not be liable merely because he was owner, or without showing that those navigating the vessel were his servants" (*n*).

It is scarcely necessary to observe that the liability of the shipowner for the acts of the master and crew does not depend upon their being on board at the time of the collision (*o*).

The act complained of must be an act of the servant within the scope of his employment.

It is further necessary, in order to fix the shipowner with liability, that the negligent act complained of was an act of the servant acting within the scope of his employment (*p*). In the ordinary case of a collision occurring in the course of the employment of the ship for the owner's benefit no difficulty arises upon this point. But when the ship is engaged upon a voyage or duty not authorized by the owner the question arises whether those on board are acting within the scope of their employment by the owner.

Where a master, without any instructions from his owner as to towing disabled ships, undertook to assist a disabled ship into port, and whilst attempting to get her in tow negligently ran into and injured her, it was contended that the owner was not liable, because the master in assisting the disabled ship was not acting within the scope of his employment. It was held that he was so acting, and that his owner was liable (*q*).

Owners not liable for wilful, malicious, and criminal acts of their servants.

Wilful, malicious, or criminal acts of the master and crew can seldom be within the scope of their employment so as to make the shipowner liable. Thus for a collision caused by the master and crew maliciously driving their

(*n*) *Per* Lord Cairns, C., *River Wear Commissioners* v. *Adamson*, 2 App. Cas. 743, 751; and *per* Lord Blackburn, *Simpson* v. *Thompson*, 3 App. Cas. 279, 293; *Hibbs* v. *Ross*, *ubi supra*.

(*o*) See *The Northampton*, 1 Sp. E. & A. 152; *Hibbs* v. *Ross*, *ubi supra*; *The Kepler*, 2 P. D. 40.

(*p*) As to what acts are within the scope of the servant's employment, see 1 Smith's L. C. 9th ed. 394; and *per* Willes, J., *Barwick* v. *English Joint-Stock Bank*, L. R. 2 Ex. 259, 265.

(*q*) *The Thetis*, 3 Mar. Law Cas. O. S. 357.

ship against another the owner will not be liable (*r*). So where those on board a ship wilfully cut another ship adrift, and the latter suffered damage in consequence, it was held that the owners of the former were not liable at law, and that their ship could not be sued in Admiralty (*s*).

But owners are liable for the acts of their servants done in the course of their service and for their master's benefit, though no express command or privity of the owner be proved (*t*). And owners are answerable for the manner in which their servants navigate their ship, though the wrongful act of the servant is one against which the owners have given express orders (*u*).

Infringement of the Statutory Regulations for Preventing Collisions at Sea is a misdemeanour, and damage caused thereby is deemed to have been caused by the wilful default of the person in charge of the deck (*v*). But owners are not relieved from liability for the acts of their servants in such cases (*x*); nor are they the less liable because the negligence of their servants is criminal, and amounts to manslaughter (*y*).

Owner's liability where the ship is under charter.

Where a ship is being worked by a charterer or hirer, who appoints and pays the officers and crew under a

(*r*) *The Druid*, 1 W. Rob. 391; *McManus* v. *Crickett*, 1 East, 106; *Croft* v. *Alison*, 4 B. & Ald. 590. In *The Seine* (Sw. 411) this defence was pleaded. There is some difficulty in reconciling these with later cases (carriage accidents), *Limpus* v. *General Omnibus Co.*, 1 H. & C. 526; *Page* v. *Defries*, 7 B. & S. 137; but character of the acts in the carriage cases is substantially different from that in the ship cases. For an instance of a wilful attack upon another ship by a tug, see L. R. 1 A. & E. 64.

(*s*) *The Ida*, Lush. 6; the ship was foreign, and the collision was in a foreign river; and see as to this case, *per* Sir R. Phillimore, L. R. 3 A. & E. 47. Cf. *Waltham* v. *Mulgar*, Moore, 776, *infra*, p. 93.

(*t*) See *per* Willes, J., *Barwick* v. *English Joint-Stock Bank*, L. R. 2 Ex. 259, 265.

(*u*) *Limpus* v. *London General Omnibus Co.*, L. R. 1 H. & C. 526; *Betts* v. *De Vitre*, L. R. 3 Ch. 441.

(*v*) 25 & 26 Vict. c. 63, ss. 27, 28.

(*x*) It was so held under the provisions of a former Act: *The Seine*, Swab. 411. See also *Poulton* v. *London and South Western Rail. Co.*, L. R. 2 Q. B. 534; *Grill* v. *General Iron Screw Collier Co.*, L. R. 3 C. P. 476.

(*y*) See *The Franconia*, 2 P. D. 8, 163; *Reg.* v. *Keyn*, 2 Ex. D. 63.

charter-party or agreement which amounts to a demise of the vessel, the owner is not liable at law for damage she may do while in the possession of the charterer. But if the owner remains in possession of the ship, either by himself or his agents, he is liable, though she is under charter to another. Where a ship was chartered to a person for six months at 20*l.* a week for the carriage of passengers and goods as he should direct, the charterer paying all disbursements and the wages of officers and crew, and the owners keeping the ship in repair, it was held that the owners were liable for a collision caused by the fault of those on board their ship (*z*).

In *Dalyell* v. *Tyrer* (*a*), H., the lessee of a ferry, hired a tug with her master and crew to assist in working the ferry for a day. A person who had contracted with H. for a season ticket was injured, whilst on board the tug, by the negligence of her crew, who were the owners' servants. It was held that he could recover against the owners, and that his right against them for the negligence of their crew was independent of his right against H. upon the contract.

It has been doubted whether the owners of a ship which is manned by a master and crew who are the owners' servants, but who, by the charter-party are bound to obey the orders of a third person who is not the owners' servant are liable at law for damage done by the ship while acting under the immediate orders of such third person. Upon principle it is difficult to see why the owners, by placing their servants under the control and orders of a third person, should escape liability for their wrongful acts. And in *Fletcher* v. *Braddick* (*b*) Sir J. Mansfield held the owners liable in such a case.

(*z*) *Fenton* v. *Dublin Steam Packet Co.*, 8 Ad. & Ell. 835. The decision went upon the words of the charter-party; but it was proved that the owners had appointed and had power to dismiss the crew and officers.

(*a*) Ell. Bl. & Ell. 899.

(*b*) 2 N. R. 182. This case is not satisfactory. The deci-

But where a vessel was one of a fleet of transports engaged in the service of the Government upon an expedition of war, it was held by Cockburn, C.J., that it was an incident to such an employment that all the vessels should obey the orders of those in command of the expedition; and that if one of them damaged another of the fleet, whilst acting in strict obedience to such orders, her owners would not be liable (*c*).

* Where a Thames barge was lent by her owner to a person, who navigated her with his own men, it was considered clear by Best, J., that the owners were not liable for damage done by her (*d*).

Owner can recover over against actual wrong-doer.

The shipowners, or employers of the master or actual wrong-doer, by whose fault a collision occurs, can recover against him any damages which they have been compelled to pay, or any loss which they have suffered by his negligence (*e*).

Owner not liable for the negligence of one to whom the ship is demised.

It has never been held that the duty to use due care and skill which is incumbent upon every person in the conduct of that which, if misconducted (*f*), may be harmful to others, attaches to a shipowner whose ship is being navigated by a person who pays the owner for the use of her, but navigates her himself or by his servants (*g*). On the contrary, it seems clear that in such a case the shipowner is under no such duty, though his ship is chartered or hired

sion went partly upon the ground that the duty of the officer did not extend to seeing to the working of the ship. The officer was in the service of the Government, who were the charterers. The case was, however, cited without comment by Sir J. Hannen in *The Tasmania*, 13 P. D. 110, 117.

(*c*) *Hodgkinson* v. *Fernie*, 2 C. B. N. S. 415; this statement of the law was approved by the Court.

(*d*) *Scott* v. *Scott*, 2 Stark. 438; but it seems that in Admiralty she would be subject to arrest. See *The Emily*, 67 L. T. 214.

(*e*) *Green* v. *New River Co.*, 4 T. R. 589; *Blewitt* v. *Hill*, 13 East, 13.

(*f*) As to this duty, see *per* Denman, C.J., *Mayor of Colchester* v. *Brooke*, 7 Q. B. 339, 377; *per* Lord Stowell in *The Dundee*, 1 Hag. Ad. 120; *per* Lord Blackburn in *The Voorwaarts* and *The Khedive*, 7 App. Cas. 795, 812; and *River Wear Commissioners* v. *Adamson*, 2 App. Cas. 743, 767. See also *infra*, p. 212.

(*g*) But the principle has been adopted in the Harbours, Docks, and Piers Act, 1847, mentioned in the next paragraph of the text, and in some local Docks Acts.

* But if owner is made to appear for ship he cannot bring in as 3rd party the person who had control of ship
Jacob Christensen v. N. June 1. 95.

for the purpose of navigation, and is in the course of employment for the owner's benefit. The duty above referred to attaches only to those who have the actual conduct of the ship and to their employers. If the duty attached to the owner *quâ* owner, it is clear that he could not free himself from it by contract (*h*); but it has been pointed out in a former page that mere ownership creates no liability for damage done by the ship (*i*).

Owner liable by statute for damage to pier, &c., by persons other than his servants.

By the Harbours, Docks, and Piers Act, 1847 (10 Vict. c. 27), s. 74, the owner of a ship which damages the harbour, dock, pier, quays, or works is answerable to the undertakers for the damage done by such ship, or by any person employed about her. This statutory liability is larger than the common law liability of the shipowner; for it exists whether the actual wrong-doer is his servant or not. The ship herself is also liable in Admiralty, and a maritime lien is, it seems, created by the statute for the amount of the damage (*j*). It has been held that, notwithstanding the words of the statute, the shipowner is not liable for injury to a pier by his ship in case of violent tempest or act of God (*k*). And the statute provides (sect. 74) that the shipowner shall not be liable where the damage was caused entirely by the fault of a compulsory pilot in charge of his ship.

Liability of persons other than owners;

The liability for damage done by a ship springing, as we have seen, not from ownership of the ship, but from the rule of law by which a man is liable for the wrongful acts of his agent acting within the scope of his employment, it is evident that, on the one hand, an owner may be liable, though the relation of master and servant does

(*h*) *Hole* v. *Sittingbourne Rail. Co.*, 6 H. & N. 488; *per* Lord Blackburn, *Dalton* v. *Angus*, 6 App. Cas. 740, 820; *Bower* v. *Peate*, 1 Q. B. D. 321; *Hughes* v. *Percival*, 8 App. Cas. 443.

(*i*) *Supra*, p. 68.

(*j*) See *The Merle*, 31 L. T. N. S. 447.

(*k*) *River Wear Commissioners* v. *Adamson*, 2 App. Cas. 743, overruling *The Merle*, 31 L. T. N. S. 447, and *Dennis* v. *Tovell*, L. R. 8 Q. B. 10.

not exist between him and the person who does the mischief, and on the other hand, that the principal or employer of the wrong-doer will be liable, whether he is also owner of the ship or not. A ship worked by a partnership is an instance of the latter case. Each member of the partnership is liable for the negligent acts of the other partners, and for the acts of agents of the partnership done in the course of the business of the partnership (*l*). In this case, unless the partner sued is an owner of the ship, it seems that his liability is unlimited (*m*).

of partners;

In *Steel* v. *Lester* (*n*) the actual owner, who was also registered as managing owner (*o*), had agreed with the skipper that the vessel should be worked entirely by him, the owner having no control over her, the crew to be engaged and the voyages to be determined at the absolute discretion of the skipper. The owner was to receive one-third of the net profits earned by the ship. It was held that the owner was liable for a collision caused by the fault of his ship. Whether the skipper was the owner's servant, or his partner (*p*) in the adventure, navigating the ship for the joint benefit of himself and the owner, it was held that the owner's liability was the same.

of charterer.

Where the person whose negligence causes the collision is the servant or agent of a charterer of the ship, the liability for damages falls on the charterer. But, except in the rare case of an actual demise of the ship, it seldom happens that the officers and crew are in the employment of the charterer and not of the owner. Whether in the case of a ship being demised to a charterer, the charterer would take the benefit of the statute limiting shipowners' liability, seems doubtful (*q*).

(*l*) As to the liability of partners for torts, see Lindley on Partnership (4th ed.), 298.

(*m*) See *infra*, p. 171.

(*n*) 3 C. P. D. 121.

(*o*) Under 38 & 39 Vict. c. 88.

(*p*) As to such an agreement not constituting a partnership, see *Burnard* v. *Aaron*, 31 L. J. C. P. 334; *The Phebe*, Ware's Reports, 263.

(*q*) See *infra*, p. 171.

A person who contracts with a shipowner for the use of his ship, with her officers and crew, for a specified time or purpose, does not thereby become liable for the negligence of those on board her. Thus where harbour commissioners contracted with a tug-owner that his tug should tow vessels into the harbour at a specified price, it was held that they were not liable for the negligence of the crew of the tug (*r*).

Liability of the ship in Admiralty.

Thus far we have considered the liability at common law of the actual wrong-doer and of persons answerable for his acts. The injured person, we have seen, has at common law no lien upon the wrong-doing ship, but only a right of action against the person in fault, and, if he was the servant or agent of another, against his employer (*s*). We now proceed to discuss the liability in Admiralty of the ship by the negligent navigation of which the damage was occasioned. In dealing with this branch of the subject it is almost impossible to avoid personifying the ship and speaking of her as the actual wrong-doer. The habit is in some respects convenient and is inveterate, and it would be useless to struggle against it. But it must not be forgotten that in speaking of a ship as a wrong-doer or "in fault" for a collision, we are using a figure of speech which is apt to be misleading (*t*). There are, indeed, to be found in the books cases which give some countenance to the doctrine that in Admiralty the ship is the real defendant; that the ship is sued, because it is she that has done the wrong, and she that pays the recompense. But it is submitted that this view of the liability of the ship

(*r*) *Cuthbertson* v. *Parsons*, 12 C. B. 304.

(*s*) See *per* Lord Blackburn, *River Wear Commissioners* v. *Adamson*, 2 App. Cas. 743, 768.

(*t*) The judgment in *The Sisters*, 1 P. D. 117, is an instance of the confusion arising from the practice of personifying the ship. A collision occurred by the fault of those on board ship A. in driving another, B., to alter her course, so as to strike and injure a third ship, C. C. sued A., and in the judgment the action is thus described:—"The suit is not brought against the actual wrong-doer, but it is brought against the vessel which caused the actual wrong-doer to do the wrong."

in Admiralty is not well founded, and that at the present day it would not be followed. It probably would never have been put forward but for the loose language frequently used with reference to negligence in the conduct of ships, which attributes the negligence not to the persons who navigate, but to the ships themselves. The process of Admiralty Courts against the ship seems clearly to have originated, not in any such idea as that involved in the law of deodand (*u*) or in the noxal action of the civil law, but simply as a ready and effectual means of compelling the wrong-doer to appear and defend the action, or to make recompense (*v*).

Some countenance is lent to the theory of the ship's, as distinguished from the owner's, liability, by cases (*x*) in which the shipowner has, by seizure and sale of his vessel in Admiralty, been held liable in damages for a collision caused by the fault neither of himself nor of his servants, but of persons in charge of his ship who were not his servants. Some of these cases have been reversed on appeal; but there is at least one (*y*) recent decision of the Court of Admiralty giving effect, at the expense of the innocent owner, to the principle that it is the ship that

(*u*) For a curious case upon the law of deodand in connection with collision, see *Reg.* v. *Polwart*, 1 Q. B. 818, where it was held that the jury have no power to levy deodand where the collision is by fault amounting to manslaughter, though they have where there is mere negligence: Law Magazine, vol. 3, p. 188.

(*v*) See *per* Dr. Lushington in *The Mellona*, 3 W. Rob. 16.

(*x*) *The Ticonderoga*, Swab. 215; *The Lemington*, 2 Asp. Mar. Law Cas. 475; and see the decision (reversed on appeal) of Sir R. Phillimore in *The Halley*, L. R. 2 A. & E. 3; on app. *ibid.* 2 P. C. 193. In America it has been held that the liability of the ship arises without regard to the ownership: see *The China*, 7 Wall. 53; *The R. B. Forbes*, 1 Sprague, 328; and *The Cumberland*, Stuart's Vice-Ad. Reports (Lower Canada, 1858), p. 75. The opposite views as to the position of the owner of a ship proceeded against in the Admiralty Court will be found discussed in *The Mullingar*, 26 L. T. N. S. 325, and *The Parlement Belge*, 5 P. D. 197, 217. In the former (an Irish) case, Townsend, J., stated that in Admiralty it is the ship, and not the shipowner, that is sued; in the latter case, Brett, L.J., held that the shipowner is in fact impleaded in Admiralty. Cf. also *The Longford*, 14 P. D. 34.

(*y*) *The Lemington*, 2 Asp. Mar. Law Cas. 475. See this and other cases below, pp. 90, *seq.*

does the wrong. Whatever ground there may be for the opinion that by the maritime law it was the ship that did the wrong (z), and the ship that paid the recompense, the principles of the common law have so far prevailed in the Admiralty of this country, that it is at least doubtful whether at the present day, notwithstanding the case above mentioned, damages could be recovered in Admiralty against an innocent shipowner, where his liability depended only upon the supposed principle of the maritime law which fixes the fault upon the ship (a).

Upon this subject the language of Selwyn, L.J., in *The Halley* may here be quoted. "In cases like the present, where damages are claimed for tortious collisions, a chattel, such as a ship or carriage, may be, and frequently is, spoken of as the wrong-doer; but it is obvious that although redress may be sometimes obtained by means of the seizure and sale of the ship or carriage, the chattel itself is only the instrument by the improper use of which the injury is inflicted by the real wrong-doer" (b).

Again, in *The Parlement Belge* (c), Brett, L.J., delivering the judgment of the Court of Appeal, said:—"In a claim made in respect of a collision the property is not treated as the delinquent *per se*. Though the ship has been in collision and has caused injury by reason of the negligence

(z) Cf. *Anon.* 1 Keb. 44, where the "misdemeanour of boat" is spoken of.

(a) The doctrine which, treating the ship as the wrong-doer, makes her liable in Admiralty under all circumstances, and without regard to her ownership, has been carried further in the American Courts than is consistent with the English decisions: see *per* Story, J., *United States* v. *The Malek Adhel*, 2 How. 210, 233. In Holmes' Common Law, pp. 26, *seq.*, and an article, 10 American Law Review (p. 432), the writer, Mr. O. W. Holmes, jun., traces a connection between the liability of the ship in Admiralty and the law of deodand; and he refers to the *noxæ deditio* of the Roman law as embodying the same idea. But there seems considerable doubt whether arrest of the ship in Admiralty had any connection with deodand or *noxæ deditio*. It was more probably adopted simply as a means of compelling the owner to appear.

(b) *Per* Selwyn, L.J., in *The Halley*, L. R. 2 P. C. 193, 201. And see *The M. Moxham*, 1 P. D. 107, 111; *Simpson* v. *Thompson*, 3 App. Cas. 279, as to the necessity of determining who is "the actual wrong-doer."

(c) 5 P. D. 197, 218.

or want of skill of those in charge of her, yet she cannot be made the means of compensation if those in charge of her were not the servants of her then owner, as if she was in charge of a compulsory pilot. This is conclusive to show that the liability to compensate must be fixed not merely on the property, but also on the owner through the property."

From the expressions used in these judgments, it would appear that the liability of the ship in Admiralty, and of the owner at common law, should always be concurrent. And in *The Druid* (*d*), Dr. Lushington said, that the liability of the ship and the responsibility of the owner, were convertible terms. But unless we are to understand "owner" to mean *pro hâc vice* owner, or in some sense other than that of general owner, the dictum of Dr. Lushington is not consistent with subsequent cases. It is clear that the ship may be liable in Admiralty where no damages could be recovered at law against the general owner. Cases in which it has been so held will be considered below (*e*).

Maritime lien for damages; its nature.

Before discussing further the cases in which the ship, as distinguished from her general owners, is liable to the sufferers in a collision, it will be convenient to consider the nature of the liability of the ship in Admiralty. This liability exists in the form of a lien or charge upon the ship, which arises in consequence of the collision in favour of the injured party. As a general rule, where a ship in the course of her employment for the owner's benefit, by the fault of those in charge, strikes or causes injury to (*f*) another ship, a charge for the amount of the loss attaches to her in favour of the sufferer. This charge or privilege, called a maritime lien, is enforced against the ship by an action *in rem* in Admiralty.

(*d*) 1 W. Rob. 391.
(*e*) *Infra*, pp. 90, *seq.*
(*f*) It seems that the lien attaches to a ship that negligently causes a collision between two others, though she does not herself strike either of them. See *infra*, p. 85.

The proceedings in an action *in rem* commence with the issue of a writ of summons addressed to the owners and persons interested in the ship (*g*); this is followed by arrest (*h*) of the ship by the marshal of the Court. Thereupon the ship, with her gear and tackle, and the freight she is earning at the time of the collision, become security to the plaintiff for any damages he may recover in the action (*i*).

The privilege or right of the injured party against the ship is inchoate from the moment of collision (*k*), and is carried into effect by proceedings in the Admiralty Division of the High Court or other Court having Admiralty jurisdiction (*l*). It is not displaced by a sale to a *bonâ*

(*g*) As to service of the writ, see *infra*, pp. 304, 327.

(*h*) The Valentinian Regulations, issued *circiter* A.D. 1336—1343, for the guidance of the Courts of the Sea at Valencia, contain provisions as to the execution of the sentence of the Court by arrest and sale of the moveable property of the defendant, including his ships. These provisions are in some respects similar to the existing process of the Admiralty; but there is no trace in them of a lien existing before arrest. See Twiss' Black Book of the Admiralty, Vol. IV. pp. 475 *seq.* The Regulations are referred to by Mr. Justice Story in *De Lovio* v. *Boit*, 2 Gall. 398, as authority for the extent and character of Admiralty jurisdiction. Arrest of a defendant's property or person, to compel him to appear, *licet in jure civili nullum habet fundamentum*, was a practice which formerly extensively prevailed on the continent of Europe—*res totâ Europâ usitatissima*: Huberi Positiones juris, ii., 4; Hub. Prælectiones jur. civ., vol. 2, 88 *seq.* This subject is fully discussed in Maine's Early History of Institutions, pp. 261 *seq.*

(*i*) Subject to the marshal's charges; *The Europa*, B. & L. 210. The nature of proceedings *in rem* is very fully discussed in the following cases: *The Bold Buccleugh*, 7 Moo. P. C. C. 267; *The Aline*, 1 W. Rob. 111; *The Mellona*, 3 W. Rob. 16; *The Nymph*, Swab. Ad. 86; *The Parlement Belge*, 5 P. D. 197; *The Orient*, 3 Mr. Law Cas. O. S. 321; L. R. 3 P. C. 696; *The Two Ellens*, L. R. 4 P. C. 161; *The Heinrich Bjorn*, 10 P. D. 44, at pp. 53, 54; *The Cella*, 13 P. D. 82; *Taylor* v. *Carryl*, 20 How. 584. It is doubtful whether the doctrine that collision gives rise to a lien is older than *The Bold Buccleugh*. In no earlier case is the doctrine explicitly stated. In Brown's Admiralty Law, vol. 2, p. 143, it is stated that "the torts of the master cannot be supposed to hypothecate the ship, nor in my humble judgment, in strictness of speech, to produce any lien on it." And so of salvage (*ib.* p. 52), there is no lien. From Clerke's Praxis, tit. 24, 28, it appears that arrest of the defendant's ship (or other goods) was an alternative to arrest of the defendant's person, and was merely a means of compelling appearance.

(*k*) *The Bold Buccleugh*, 7 Moo. P. C. C. 267.

(*l*) The statutes conferring and regulating Admiralty jurisdiction are: — High Court, 13 Ric. 2, stat. 1, c. 5; 15 Ric. 2, c. 3; 3

fide purchaser without notice (*m*), by the owner's death (*n*), or bankruptcy (*o*), or, if the ship is owned by a company, by a winding-up order against the company (*p*), or by a sale under the order of a foreign Court in which the proceedings are not *in rem* (*q*). The injured party must, however, take proceedings to enforce his right within a reasonable time, or he will lose the benefit of his lien (*r*), at any rate where there are circumstances which render its enforcement inequitable. Where the defendant ship was owned by a company, and many of the shares in the company had changed hands since collision, this was held not to constitute a sufficient change of interest to render the enforcement of the lien inequitable (*s*). The indelible character of the lien for damages is analogous to the *noxa caput sequitur* of Roman law: and supports the theory that by the ancient doctrine of the Admiralty it was the ship that "did the wrong" (*t*).

To what the lien attaches.

The lien attaches to the hull of the ship, and also to her tackle, apparel, and furniture. Thus her sails and rigging (*u*), and her equipment for a fishing voyage (*x*), have been held subject to it. But it does not attach to the wearing apparel of passengers on board her (*y*). The lien exists after the ship has been wrecked and broken in pieces, and it may be enforced against the fragments (*z*).

& 4 Vict. c. 65; 24. Vict. c. 10. County Courts: 31 & 32 Vict. c. 71; 32 & 33 Vict. c. 51; 38 & 39 Vict. c. 50. Vice-Admiralty Courts: 26 & 27 Vict. c. 24; 39 & 40 Vict. c. 59; 53 & 54 Vict. c. 27 (Colonial Courts). Scotland: 11 Geo. 4 & 1 Will. 4, c. 69. Ireland: 30 & 31 Vict. c. 114; 39 & 40 Vict. c. 28; 40 & 41 Vict. c. 56.

(*m*) *The Bold Buccleugh*, 7 Moo. P. C. C. 267; *The Nymph*, Swab. 86; *The Mellona*, 2 W. Rob. 16.

(*n*) See *Phillips* v. *Homfray*, 24 Ch. D. 439, and cases there cited, as to an action at law in this case.

(*o*) *The Young Mechanic*, 2 Curtis, 404 (Amer. case).

(*p*) *In re Australian Direct Steam Navigation Co.*, L. R. 20 Eq. 325; *In re Rio Grand do Sol. Steamship Co.*, 5 Ch. D. 282; *The Cella*, 13 P. D. 82.

(*q*) *The Charles Amelia*, L. R. 2 A. & E. 330.

(*r*) In *The Europa*, 2 Moo. P. C. C. N. S. 1, the lien was held to be subsisting three years, and in *The Kong Magnus*, 89 L. T. 254, eleven years, after the collision. See also *The Fairport*, 8 P. D. 48.

(*s*) *The Kong Magnus*, *supra*.

(*t*) See above, p. 76.

(*u*) *The Alexander*, 1 Dods. 278.

(*x*) *The Dundee*, 1 Hagg. 109.

(*y*) *The William III.*, L. R. 3 A. & E. 487.

(*z*) *The Neptune*, 1 Hagg. 227, 238

Cargo may be arrested to compel payment of freight.

Cargo on board the ship arrested forms no part of the *res* to which the lien attaches; but it is subject to arrest in order to compel the payment into Court of freight due to the shipowner (*a*); and if part has been discharged, the remainder will be released only upon payment of the whole of the freight (*b*); and when the ship is ordered to be sold, the Court will order the marshal to retain the cargo as security for the freight and charges, and, if no application be made, to sell such part as may be necessary to pay them (*c*). Such freight is part of the *res*, although the cargo in respect of which it is payable was not on board at the time of the collision, if the vessel arrested was in fact then engaged in earning it. Thus, where a ship was in collision on her outward voyage with a cargo on board for the owner's benefit, it was held that the cargo which she was then under charter to bring home from the foreign port was liable to arrest (*d*). But where the freight had been paid, and the ship was subsequently, and before arrest, sold, it was held that the new owner was not liable beyond the value of the ship (*e*).

What craft are subject to arrest.

Barges and craft propelled by oars only are subject to arrest if the collision occurs on a tideway (*f*); but not, it seems, where the injury is to a craft which is not seagoing, and the collision occurs in the body of a county. Thus it has been held that a County Court has no jurisdiction in the case of a collision between two lighters in the Thames, upon the ground that the Admiralty Court had

(where the lien was for wages); *The Bold Buccleugh*, 7 Moo. P. C. C. 267. Disting. *The Annie*, 12 P. D. 50 (a case of life salvage).

(*a*) *The Victor*, Lush. 72; *The Leo*, Lush. 444; *Nixon* v. *Roberts*, 1 J. & H. 739. As to arrest of cargo where no freight is due, see *The Flora*, L. R. 1 A. & E. 45. Art. 736 of the German Commercial Code provides for arrest of cargo for the same purpose.

(*b*) *The Roecliff*, L. R. 2 A. & E. 363.

(*c*) *The Gettysburg*, 5 Asp. M. C. 347. In that case the cargo was ordered to be kept for fourteen days before sale.

(*d*) *The Orpheus*, L. R. 3 A. & E. 308.

(*e*) *The Mellona*, 3 W. Rob. 16, 25.

(*f*) *The Sarah*, Lush. 549; *Purkis* v. *Flower*, L. R. 9 Q. B. 114; *The Emily*, 67 L. T. 214.

no jurisdiction in such a case (*g*). But a ship injuring a barge is liable to arrest (*h*). And if a foreign ship injures a British ship, or property of a British subject, in any part of the world, she may be detained if found within three miles of the shore of the United Kingdom (*i*). A ship which had been so detained was, after an absolute appearance by her owners in Admiralty, held liable *in rem* for injury to a barge within the body of a county (*k*). The owner of cargo cannot, under 24 Vict. c. 10, s. 7, take proceedings *in rem* against the carrying ship in respect of damage to cargo (*l*).

Priority of damage lien.

A plaintiff who obtains judgment in a damage action is entitled to enforce his lien to the exclusion of another damage claimant who institutes his action after judgment even on the same day (*m*). And the damage lien takes precedence of charges upon the ship arising out of contract, such as mortgages (*n*) and bottomry bonds, whether prior or subsequent to the collision in date (*o*), liens for wages, whether earned before or after the collision (*p*), liens for pilotage (*q*), and (probably) the possessory lien of a shipwright for repairs (*r*). But it ranks after the

(*g*) *Everard* v. *Kendall*, L. R. 5 C. P. 428. For the reason of the distinction as to sea-going craft, see below, p. 326; and as to County Court jurisdiction, below, p. 326.

(*h*) *The Malvina*, Lush. 493; Br. & L. 57.

(*i*) 17 & 18 Vict. c. 104, s. 527.

(*k*) *The Bilbao*, Lush. 149.

(*l*) *The Victoria*, 12 P. D. 105.

(*m*) *The Saracen*, 6 Moo. P. C. C. 56; *The Desdemona*, Swab. 158; and see *The Markland*, L. R. 3 A. & E. 340; *The Alne Holme* (first action), 47 L. T. N. S. 309.

(*n*) See *The Chieftain*, Br. & Lush. 104, 111, as to the mortgagee's position.

(*o*) *The Aline*, 1 W. Rob. 111; *infra*, p. 83. It has recently been held in America that the damage lien takes precedence of the lien for necessaries supplied prior to the collision: *Loud* v. *Tugboats John G. Stevens and R. S. Carter*, 89 L. T. 164.

(*p*) *The Benares*, 7 Not. of Cas. Suppl. p. 50; *The Linda Flor*, Swab. 309; *The Duna*, 5 L. T. N. S. 217; *The Elin*, 8 P. D. 39, 129; *The Chimæra*, cited 8 P. D. 46, 131, in all which cases, however, the ship was foreign.

(*q*) Abbot on Sh. (12th ed.), 597; *The Benares*, *supra*. *Quære*, whether any such lien exists.

(*r*) Precedence was given to a salvage lien over the shipwright's lien in *The Gustaf*, Lush. 506. But see *The Aline*, 1 W. Rob. 111. The shipwright's lien is not determined by arrest of the ship in a necessaries action: *The Acacia*, 4 Asp. Mar. Law Cas. 264.

claim of a bondholder who, after the collision and before arrest, without notice of the damage lien, advances upon bottomry money which is afterwards expended in repairs —so far, at least, as such claim relates to the increased value of the ship by reason of such repairs (*s*); and it probably ranks after a salvage lien attaching after the collision (*t*).

The case of *The Aline* (*u*), which is frequently cited upon the question of priority of liens, was as follows:— A Russian schooner, *The Aline*, went into Cowes to be repaired after collision on the 22nd of September with *The Panther*, a British brig. One Day, without notice of any proceedings against *The Aline* being intended, undertook to be responsible for 254*l.* 2*s.* 6*d.* for repairs to *The Aline* upon her master agreeing to give a bottomry bond for that amount. On the 20th of October *The Aline* was arrested in a damage suit at the instance of the owner of *The Panther*. On the following 31st of January *The Aline* was held solely in fault for the collision. She was afterwards sold under the process of the Court, and realized 208*l.* 4*s.* 9*d.* The registrar found that 220*l.* 13*s.* 10*d.*, besides some interest and costs, was due to the owner of *The Panther*. The repairs were effected partly before and partly after the arrest. A question arose between Day (who was treated as a bondholder) and the owner of *The Panther* as to the right to the proceeds of the sale of *The Aline*. It was held that the owner of *The Panther* was entitled to the value of *The Aline* before the repairs were commenced, and of that part of the repairs which were done after the arrest took place. The decision was founded upon considerations of policy, it being thought inexpedient, *The Aline.*

(*s*) *The Aline*, 1 W. Rob. 111. As to the ground of this decision, see *per* Parke, B., in *The Bold Buccleugh*, 7 Moo. P. C. C. 267, 285. Whether the bondholder would have priority where the owner of the damage lien is not benefited by the repairs is doubtful.

(*t*) See *The Selina*, 2 Not. of Cas. 18; *Cargo ex Galam*, Br. & Lush. 181; *Att.-Gen.* v. *Norstedt*, 3 Price, 97.

(*u*) 1 W. Rob. 111.

as regards the interests of both the owner of the wrong-doing and the owner of the injured ship, to throw difficulties in the way of bottomry transactions tending to benefit both of them (*x*).

It will be observed that in *The Aline* it was held that the owner of the injured ship was entitled to such part of the proceeds of sale as represented the accretion in value due to repairs effected after arrest. In a subsequent case (*y*), where the ship had without consent been repaired and increased in value after arrest, it was held that the owner was entitled to have her released upon payment into Court of her value at the date of the arrest.

Order of claimants in several damage actions.

Where several claimants for damages in several actions *in rem* in respect of the same collision obtain successive judgments against the ship, their respective liens are enforceable against the ship in the order of the judgments (*z*). A plaintiff who institutes his action after another has been instituted, but before judgment, is entitled to damages rateably with the plaintiff in the earlier action (*a*).

Effect of a winding-up order or bankruptcy upon the damage lien.

In the case of a ship owned by a company in liquidation the damage lien will be enforced in priority to the claims of the general creditors (*b*). If all parties are before the Court, an order will be made in the liquidation for payment of the amount of the lien. But if parties interested in the ship, as mortgagees in possession, are not before the Court and cannot be brought before it, leave must be obtained in the winding-up to proceed in Admiralty. An

(*x*) But see *per* Parke, B., on this case in *The Bold Buccleugh*, 7 Moo. P. C. C. 267, 285.

(*y*) *The St. Olaf*, L. R. 2 A. & E. 360. It does not appear that *The Aline* was cited.

(*z*) *The Saracen*, 6 Moo. P. C. C. 56. As to a stay of proceedings in such a case to enable the defendant to limit liability, *The Aline Holme* (first action), 47 L. T. N. S. 309.

(*a*) *The Clara*, Swab. 1. See *The Union*, 3 L. T. N. S. 280; *infra*, p. 215, as to this being a *lex fori*.

(*b*) *In re Australian Direct Steam Navigation Co.*, L. R. 20 Eq. 325; *In re Rio Grande do Sul Steamship Co.*, 5 Ch. D. 282. See also *In re Traders' North Staffordshire Carrying Co.*, L. R. 19 Eq. 60, as to the right, after winding-up order, to sell a barge for tolls due before winding-up; and see also as to enforcing a necessaries lien in case of bankruptcy, *Halliday* v. *Harris*, L. R. 9 C. P. 668.

arrest of the ship by the Admiralty Court after a winding-up order has been made is void, unless leave to proceed in Admiralty has been obtained in the winding-up (*c*).

In Ireland an injunction to restrain an Admiralty action *in rem* was refused by a Court of Bankruptcy, except upon payment into Court of the amount of the claim and an undertaking being given as to costs (*d*).

Whether the lien attaches when there is damage, but no collision.

Though it has not been expressly so held, it appears that the lien attaches not only to a ship that strikes and injures another, but to a ship by the negligent navigation of which a collision is caused between two other vessels (*e*). By virtue of 10 & 11 Vict. c. 27, it attaches to a ship that injures a pier or harbour works (*f*), and probably it attaches in all damage cases where the Admiralty has jurisdiction by statute (*g*); but not where the plaintiff is suing the owner of the carrying ship for damage to his goods under the provisions of 24 Vict. c. 10, s. 6. In this case the Act gives a right against the ship, but no lien (*h*). For loss of life, since no action lies *in rem* (*infra*, p. 122), there is no lien.

Whether the damage lien attaches when the Admiralty Court has jurisdiction by statute only.

It has not been expressly decided whether the lien for damage attaches in cases where the Admiralty Court has jurisdiction only under the modern statutes, 3 & 4 Vict. c. 65, and 24 Vict. c. 10. If the collision occurs within the body of a county, or if one ship is injured by the negligence of those in charge of another ship, without

(*c*) See note (*b*), *ante*, p. 84.

(*d*) *In re T. C.*, Ir. Rep. 11 Eq. 151. And see *The John and Mary*, Swab. 471.

(*e*) See *The Sisters*, 1 P. D. 117; *The Wheatsheaf* and *The Intrepide*, 2 Mar. Law Cas. O. S. 292; *The Industrie*, L. R. 3 A. & E. 303; *The Energy*, *ibid.* 48; *The Batavier*, 9 Moo. P. C. C. 286; *The Digby Grand*, Ad. Ct. April, 1884, *infra*, p. 137.

(*f*) *The Merle*, 31 L. T. N. S. 447; Cf. *The Czar*, 19 Low. Canada Jurist, 197 (damage by ship's anchor to telegraph cable).

(*g*) See *The Clara Killam*, L. R. 3 A. & E. 161; *The Sylph*, L. R. 2 A. & E. 24; *The Uhla*, 3 Mar. Law Cas. O. S. 148; *The Chase*, Stuarts' (Canada) Rep. 361.

(*h*) *The Pieve Superiore*, L. R. 5 P. C. 482. But see *The Patria*, L. R. 3 A. & E. 436, 459. As to the effect in such an action of sect. 7, see *The Victoria* (No. 1), *supra*, p. 82.

actually being in contact with the latter (*i*), the wrong-doing ship may be sued in Admiralty *in rem*, and there are strong grounds for holding that in these, as in other cases of damage, the lien attaches (*k*). But it is not in every case in which the ship may be sued *in rem* that the lien attaches (*l*); and there are cases in which the Admiralty Court has statutory jurisdiction, as in the case of damage by a ship to a pier (*m*), and certain collisions within a county, in which it does not appear to have been expressly decided that the lien attaches.

Lien by statute, in case of injury to a pier, &c.

It has been held that the liability created by 10 & 11 Vict. c. 27, upon the owner of a ship that injures a pier or harbour works, and upon the ship herself, involves a maritime lien upon the ship (*n*).

Bail takes place of ship arrested.

A ship will be released after arrest upon money being paid into Court or bail being given in a sum sufficient to satisfy the plaintiff's claim or to the amount of the defen-

(*i*) As in *The Industrie*, L. R. 3 A. & E. 303; *The Energy*, *ibid.* 48; *The Sisters*, 1 P. D. 117; and cases cited *supra*, p. 27, note (*u*).

(*k*) *The Two Ellens*, L. R. 4 P. C. 161, 167; *The Mary Ann*, L. R. 1 A. & E. 8, 12; *The Sara*, 12 P. D. 158, 162; 14 App. Cas. 209, 216. In America it has been held that a ship may recover in Admiralty the value of an anchor and chain from which she had to slip to avoid another ship driving towards her: *The Perkins*, 2 Mar. Law Cas. O. S. Dig. 548; and that no lien attaches to a ship for damage to a bridge: 1 Parsons on Sh., ed. 1869, p. 532; but the owner of a pier improperly built in a fairway was sued in Admiralty for damage to a ship sunk by collision with it, no question being raised as to jurisdiction: *Atlee* v. *The Packet Co.*, 21 Wall. 389. In another case a ship was sued in Admiralty for injury caused by her warp, which was negligently stretched across a river: *McCord* v. *The Steamboat Tiber*, 6 Bissel, 409. As to Admiralty jurisdiction in case of collision between a raft and a ship, see *The W. T. Clark*, 5 Bissel, 295. By the Supreme Court it was held that the owners of a ship from which fire had been communicated to a warehouse on shore could not be sued in Admiralty: *The Plymouth*, 3 Wall. 20. The Royal Court of Jersey has held that personal injury caused by the breaking of a ship's warp by improper straining is not within its Admiralty jurisdiction: *The Cygnus*, 2 L. T. N. S. 196.

(*l*) See *The Pieve Superiore*, L. R. 5 P. C. 482; *The Heinrich Bjorn*, 10 P. D. 44; 11 App. Cas. 270.

(*m*) As in *The Uhla*, 3 Mar. Law Cas. O. S. 148; *The Excelsior*, L. R. 2 A. & E. 268; *The Albert Edward*, 44 L. J. Ad. 49; *The Maid of the Mist*, 21 W. R. 310, decided under the Court of Admiralty (Ireland) Act, 1867, s. 29.

(*n*) *The Merle*, 31 L. T. N. S. 447. This case was overruled upon another point in *River Wear Commissioners* v. *Adamson*, 2 App. Cas. 743.

dant's liability (*o*). In such a case the money in Court, or the amount of the bail, takes the place of the ship, as a security for what may be recovered in the action, and the ship herself is free (*p*). Though it has been held, where the amount for which bail was given was insufficient to provide for damages and costs, that the ship may be re-arrested to satisfy the claim for costs (*q*), it is doubtful whether a re-arrest to satisfy damages where the amount of the bail is insufficient, would be allowed (*r*). Where bail is given in an amount beyond the owner's statutory liability, the sum recoverable is, nevertheless, limited to the statutory amount (*s*). Where excessive bail is required the amount will be moderated upon an application to the Court (*t*), and in recent years the additional expense of procuring excessive bail has been ordered to be paid by the party requiring it.

Commission paid on procuring bail cannot, however, be recovered as part of the defendant's costs, though it may be recovered as damages where it is shown that the ship was arrested maliciously or with gross negligence (*u*).

Insufficient bail; further remedy against proceeds of ship.

Where after judgment in a damage action, in which bail for an insufficient amount had been given and the ship released, judgment was given against the same ship in an action for necessaries, and the ship was sold in the necessaries action and the money paid into Court, it was held that the plaintiffs in the damage action could not be

(*o*) As to the practice touching bail, see Williams and Bruce, Ad. Pr. 2nd ed. p. 282 *seq.*

(*p*) See Roscoe's Ad. Pr. 2nd ed. 152, 156. As to security to answer a counter-claim where the defendant's ship is not arrested, see *The Alne Holme* (second action), 47 L. T. N. S. 307; 24 Vict. c. 10, s. 34. As to the proper mode of obtaining judgment where there is default of appearance, see *The Avenir*, 9 P. D. 84.

(*q*) *The Freedom*, L. R. 3 A. & E. 405; and see *The Flora*, L. R. 1 A. & E. 45.

(*r*) *The Kalamazoo*, 15 Jur. 885; *The Volant*, 1 W. Rob. 383; *The Temiscouata*, 2 Sp. E. & A. 208; *The Falk*, *infra*.

(*s*) *The Duchesse de Brabant*, Sw. 264; *The Chieftain*, 32 L. J. Ad. 106; *The Staffordshire*, L. R. 4 P. C. 194.

(*t*) *Owen* v. *The Providence*, Ad. Ct. 1766; Marsden's Ad. Ca. 13. See also *The Chieftain*, Br. & L. 104; *The Victor*, Lush. 72.

(*u*) *The Collingrove*, 10 P. D. 158.

paid out of the proceeds of the sale of the ship to the prejudice of the claimants in the necessaries action (*x*).

Assignment of lien.

The assignee of a right to proceed *in rem* for repairs is entitled to enforce his right against the ship, notwithstanding a composition deed executed by the assignor after the arrest of the ship; and although at the date of the assignment the ship was not under arrest, and the right of the assignor was inchoate only (*y*). It seems that the right of an assignee of a lien for damage would be the same.

Discharge of the lien.

The lien for damage which, we have seen, attaches at the instant of collision (*z*) adheres to the ship until it is discharged by being satisfied, by laches (*a*), or in any other way in which by law it may be discharged (*b*). It seems that it may be enforced after the death or bankruptcy of the wrongdoer, or of the person liable at law for the acts of the wrongdoer, and, in the absence of laches, it is not barred by the Statute of Limitations or by lapse of time (*c*).

From the above statement as to the nature of the maritime lien for damages, it will be seen that proceedings against the ship in Admiralty provide the sufferer by collision with a remedy in many cases where he would otherwise be without redress; as where the owners of the

(*x*) *The Falk*, 4 Asp. Mar. Law Cas. 592.

(*y*) *The Wasp*, L. R. 1 A. & E. 367. The principle of this decision would not appear to be affected by *The Heinrich Bjorn*, 11 App. Cas. 270. See as to assignment of choses in action, S. C. J. Act, 1873, s. 25, sub-s. 6; and as to the effect of bankruptcy therein, Bankruptcy Act, 1883, s. 44; *Re Tillett, Ex p. Kingscote*, 60 L. T. N. S. 575. As to assignment of the lien, see *The Merle*, 31 L. T. N. S. 447; *The New Eagle*, 4 Not. of Cas. 426; *The Janet Wilson*, Swab. 261; *The Louisa*, 6 Not. of Cas. 531.

(*z*) *The Bold Buccleugh*, 7 Moo. P. C. C. 267; *The Mary Ann*, L. R. 1 A. & E. 8, 11.

(*a*) See *per* Mellish, L. J., *The Two Ellens*, L. R. 4 P. C. 161, 169.

(*b*) It is discharged by sale of the *res* under process of the Court: *The Saracen*, 2 W. Rob. 451; by payment and acceptance of the amount of the claim: *The William Money*, 2 Hag. 136; or by acceptance of bail, whether the amount of bail is sufficient to recompense the sufferer or not: *The Kalamazoo*, 15 Jur. 885, *supra*, p. 87.

(*c*) See *per* Mellish, L. J., L. R. 4 P. C. 170; *The Kong Magnus*, 63 L. T. N. S. 715.

wrongdoing ship are resident abroad, dead, or bankrupt, or for other reasons cannot be sued personally.

Whether the ship may be liable where the owner is not.

The question referred to above (*d*) has arisen in several cases,—namely, whether the ship may be liable in proceedings *in rem* where the collision is not caused by the fault of the owner or his agents, and where, consequently, he could not be made liable at law. In *The Druid* (*e*), Dr. Lushington said, that the liability of the ship and the responsibility of the owner were convertible terms. And in some later cases the liability of the ship and the responsibility of the owners have been spoken of by the Privy Council as if they were always concurrent (*f*) In a case before the Court of Appeal it was expressly said that "the liability to compensate must be fixed not merely on the property but on the owner through the property" (*g*). On the other hand there are decisions in Admiralty holding the ship liable where the owner could not be sued at law (*h*).

Ship in hands of agent for sale.

Thus where a yacht was placed by her owners in the hands of an agent for sale, and whilst in his possession, and owing to his negligence in not striking her top gear, she drove from her moorings and injured another ship, it was held that the yacht was liable. The proceedings being *in rem*, Dr. Lushington said that the common law doctrine

(*d*) *Supra*, p. 75. For further information upon this subject, see a pamphlet entitled "Maritime Lien," by the Hon. John W. Mansfield, London, Stevens & Sons, 1889.

(*e*) 1 W. Rob. 391. It appears from *The Tasmania*, 13 P. D. 110, 116, that in the opinion of Sir J. Hannen, by "owners" Dr. Lushington meant to include charterers.

(*f*) *The Diana, Stuart* v. *Isemonger*, 4 Moo. P. C. C. 11, 19; *The Amalia*, 1 Moo. P. C. C. N. S. 471, 484; *The Halley*, L. R. 2 P. C. 193; *The Orient*, 3 P. C. 696, 703; *The M. Moxham*, 1 P. D. 107.

(*g*) *Per* Brett, L. J., *The Parlement Belge*, 5 P. D. 197, 218.

(*h*) Besides the cases mentioned below, it was so held in *The Neptune the Second*, 1 Dods. Ad. 467; and *The Girolamo*, 3 Hag. Ad. 169, where the vessel was condemned for the fault of a compulsory pilot. These decisions were, however, not followed in subsequent cases: see *The Protector*, 1 W. Rob. 45; *The Maria, ibid.* 95. In *The Druid*, 1 W. Rob. 391, Dr. Lushington said that the liability of the ship, and the responsibility of the owners, were convertible terms. Whether this dictum is to be understood as referring to the *pro hâc vice* owner or to the general owner, its accuracy in law seems to be equally doubtful. Cf. *The Longford*, 14 P. D. 34.

as to the non-liability of her owner for the negligence of an independent contractor had no application (*i*). At common law the owner would not be liable in such a case (*k*).

Ships under charter.

Where a vessel was chartered to the French Government, and whilst in tow of a steamship, which the charterers ordered her to employ, by the fault of the steamship, went foul of a third vessel, Dr. Lushington held that, the proceedings being *in rem*, the maritime lien for damage attached, notwithstanding any prior contract between the owner and a third party. "It is impossible," he said, "that because a person has entered into a voluntary contract by which he is finally led into mischief, that that can relieve him from making good the mischief which he has done." And he said that this was the case though the ship has been demised by the owner to another who has the appointment of the master and crew (*l*).

The case here anticipated by Dr. Lushington afterwards came before Sir R. Phillimore, and was decided in accordance with the above opinion of Dr. Lushington. In *The Lemington* (*m*) the vessel was chartered by her owners to a person upon terms by which the charterer had the sole and absolute management of her and the appointment of her crew. The charterer was to pay all expenses connected with the ship, and her owners were to receive one-fifth of her gross earnings. It was held that the ship was liable in proceedings *in rem*. Sir R. Phillimore said:—

(*i*) *The Ruby Queen*, Lush. 266; see also *The Orient*, L. R. 3 P. C. 696.

(*k*) See *per* Blackburn, *River Wear Commissioners* v. *Adamson*, 2 App. Cas. 743, 768; *Eglington* v. *Norman*, 46 L. J. Ex. 557.

(*l*) *The Ticonderoga*, Swab. Ad. 215. "There is nothing in this judgment which leads to the conclusion that Dr. Lushington intended to retract what he said in *The Druid*:" *per* Sir J. Hannen, *The Tasmania*, 13 P. D. 110, 117. See also a dictum of Dr. Lushington in *The Mellona*, 3 W. Rob. 16, 21, as to the liability of the ship without regard to the question whether the owners at the date of the arrest were the owners at the date of the collision.

(*m*) 2 Asp. Mar. Law Cas. 475.

"A vessel placed by its real owners wholly in the control of charterers or hirers, and employed by the latter for the lawful purposes of the hiring, is held by the charterers as *pro hâc vice* owners. Damage wrongfully done by the *res* while in possession of the charterers is therefore damage done by the owners or their servants, although those owners may be only temporary. Vessels suffering damage from a chartered ship are entitled, *primâ facie*, to a maritime lien upon that ship, and look to the *res* as a security for the restitution. I cannot see how the owners of the *res* can take away that security by having temporarily transferred the possession to third parties. A maritime lien attaches to a ship for damage done through the negligence of those in charge of her, in whosesoever possession she may be, if that damage is inflicted by her whilst in the course of her ordinary and lawful employment, authorized by her owners. Whether the damage is done through the default of the servants of the actual owners, or of the servants of the chartered owners, the *res* is equally responsible, provided that the servant making default is not acting unlawfully or out of the scope of his authority" (*n*).

The liability of the owner in this case has been compared to that of the holder of a bottomry bond executed before a collision for which the ship is in fault. In such a case the damage lien takes precedence of the bottomry lien. The bondholder is, "so to speak, a part owner in

(*n*) See also *The Emily*, 67 L. T. 214, where a barge, worked by the hirer's servants, and not by the owner or his servants, was held subject to arrest; cf. also *The Phebe*, Ware, 263. The charterer of a ship in the situation of *The Lemington*, *supra*, p. 90, is held to be entitled to owner's salvage reward: *The Scout*, L. R. 3 A. & E. 512; but the actual owner is entitled to owner's salvage, where, notwithstanding the charter, the ship remains in his, or his agent's, possession: *The Collier*, L. R. 1 A. & E. 83; *The Waterloo*, 2 Dods. Adm. 433. In France it seems that a ship in the position of *The Lemington* is liable to the sufferer by collision as "guarantie speciale:" Manuel de Droit Commercial, par P. Bravard Veyrières, 7th ed. par Ch. Demangeat, p. 343. See also below, p. 184, as to the liability in France of the ship as distinguished from the owner.

interest at the date of the collision, and the ship in which he and others are interested is liable to its value at that date (of the collision) without reference to his claim" (*o*).

The Tasmania. The liability of the ship, as distinguished from that of the owner, was lately under discussion in *The Tasmania* (*p*). The conclusion arrived at in that case by Sir James Hannen was, that the damage lien is not absolute; that it does not arise upon the mere fact of collision through the negligence of those on board; that it arises only where "the navigators can be identified with the owners or their agents;" and that by the maritime law, "charterers to whom the government of the ship is voluntarily handed over, represent the owners so as to bind the ship." There is, he said, a *primâ facie* liability of the ship, which may be rebutted by showing that the injury was done by the act of some one navigating the ship not deriving his authority from the owners; and by the maritime law, charterers in whom the control of the ship has been vested by the owners are deemed to have derived their authority from the owners so as to make the ship liable for the negligence of the charterers who are *pro hâc vice* owners. From these premises he drew the conclusion, that whatever is a good defence for the charterers against the claim of the injured person is a good defence for the ship, as it would have been if the same defence had arisen between the owners and the injured person.

The facts of the case to which Sir James Hannen applied these principles were these:—The plaintiff, the owner of the smack *Striver*, sued the tug *Tasmania*, *in rem*, for sinking the smack whilst towing her into Yarmouth harbour. The collision was caused entirely by the fault of the master of the tug. *The Tasmania* was owned by

(*o*) *Per* Jervis, C. J., *The Bold Buccleugh*, 7 Moo. P. C. C. 267, 285. Cf. the liability of the ship for wages of a crew not employed by her owner, *Wells* v. *Osmond*, 2 Raym. 1044.

(*p*) 13 P. D. 110.

one Watkins, and she was chartered by the Great Yarmouth Steam Tug Company at 30*l.* per week, the charterers finding a captain and the owners the crew. The plaintiff, who was a director of the tug company, had been in the habit of employing the company's tugs to tow his smacks upon terms published by the company, one of which was that the company were not to be liable for damage to smacks when in tow of their tugs. It was held that the plaintiff employed *The Tasmania* upon the terms published by the company with reference to their own tugs; that in contracts made upon the published terms there was necessarily implied an agreement that the tug should not be liable *in rem;* and that consequently *The Tasmania* was not liable *in rem*, no damage lien having arisen.

Having regard to the above decisions, it seems that, notwithstanding *dicta* to the contrary, a person injured by a collision can in some cases recover against the owner of the ship that has done the damage by proceedings in Admiralty *in rem* where he could not recover at common law. But until the point has been considered by a Court of Appeal, the law cannot be considered as settled (*q*).

The liability of the ship (as distinguished from the owner) in American law.

In America, the liability of the ship, as distinguished from the personal liability of the owner, has been carried further than it has ever been carried by the Courts of this country. In a case before the Supreme Court (*r*), Story, J., quoted with approval the following passages from a judgment of Marshall, C. J.:—"This is not a proceeding against the owner; it is a proceeding against the vessel for an offence committed by the vessel." And again, quoting from another case, he says:—"The thing is here primarily considered as the offender, or rather the offence is primarily attached to the thing." This, it will be

(*q*) In *Waltham* v. *Mulgar*, Moore, 776, the Admiralty Court was prohibited where it proposed to exercise jurisdiction in the case of a ship whose crew, against the owner's orders, had piratically seized the plaintiff's ship.

(*r*) *The Malek Adhel*, 2 How. 210, 234.

observed, is not the view taken by the Courts of this country (*s*).

Instance of the ship being affected by the fault of persons for which the owner is not answerable.

An instance of the ship being affected by the fault of those on board, for which her owners are not liable at law, occurs where a collision is caused by the fault of both ships, and the fault of one of them is the fault of her compulsory pilot. In this case her owners can recover half, but only half, their loss against the other ship and her owners (*t*); and that only subject to the rule, usual in such cases, of having to bear their own costs (*u*). The fault of the pilot affects the ship to this extent—that it brings into operation the rule as to division of loss; but it would seem not to be contributory negligence such as would affect the owners at law (*x*).

By the maritime law ship and owners liable for damage caused by negligent navigation.

By the maritime law, as administered in the Admiralty of this country, the owners of a ship that negligently damages another on the high seas are liable for the negligence of their servants on board such ship, and the damage lien attaches to the ship. Thus Lord Stowell, in *The Dundee* (*y*), said that "negligent navigation causing damage to another ship the maritime law considers as a dereliction of bounden duty, entitling the sufferer to reparation in damages. The ancient general law exacted a full compensation out of all the property of the owners of the guilty ship, upon the common principle applying to persons undertaking the conveyance of goods (*z*), that they

(*s*) In America the ship is liable for the master's contracts in cases where she would not be liable by English law; cf. *The Neversink*, 5 Blatch. C. C. R. 539; Act of Congress of 3rd March, 1851. Upon the question whether the owners of a chartered ship are liable in proceedings *in rem* for "torts committed by the ship," the Supreme Court was equally divided in *Thorp* v. *Hammond*, 12 Wall. 408; see also *The Clarita* and *The Clara*, 23 Wall. 1.

(*t*) *The Hector*, 8 P. D. 218.

(*u*) *The Hector*, 8 P. D. 218; *The Rigbords Minde*, 8 P. D. 132.

(*x*) See *Spaight* v. *Tedcastle*, 6 App. Cas. 217.

(*y*) 2 Hag. 120.

(*z*) "I should rather say undertaking the management of anything likely to do mischief, unless attention and vigilance is used by those who manage it:" *per* Lord Blackburn, *Stoomvaart Maatschappy Nederland* v. *P. and O. Steam Navigation Co.*, 7 App. Cas. 795, 812.

were answerable for the conduct of the persons whom they employed, and of whom the other parties who suffered damage knew nothing, and over whom they had no control. To this rule our own country conformed" (*a*). It is the maritime law, and not the law of the flag, that governs in such a case. Thus, where the owners of a cargo on board a ship sailing under the Dutch flag sued the owners of another Dutch ship for loss of cargo in a collision on the high seas caused by the fault of the latter ship, it was held that the Dutch law (by which, it was alleged, the owners of the wrongdoing ship were not liable) was not applicable to the case (*b*).

Collision abroad: conflict of law.

In an unreported case before the Admiralty Division the question arose whether, where two foreign vessels were in collision at the mouth of a Spanish river, proceedings *in rem* could be taken against one of them in the English Admiralty, it being alleged that by Spanish law the shipowner is not answerable for the wrongful acts of those in charge of his ship. No decision was arrived at, the case going off upon a point of pleading (*c*). The suggestion that the law of the place where the collision occurred is to prevail, and is to exclude the damage lien, is a novel one, and would probably not prevail (*d*).

Neither ship nor owners liable for fault of a compulsory pilot.

Notwithstanding some early decisions to the contrary (*e*), it is now settled that where a collision is caused by a pilot placed in charge of a ship by the law, the fault of the pilot does not affect the ship so as to make her liable in Admiralty, nor are the owners answerable for the pilot's negligence at law. It must not, however, be assumed that the pilot's negligence can under no circumstances affect the ship. We shall see that the rule of division of loss

(*a*) See also *The Ticonderoga*, Swab. 215; *The Mellona*, 3 W. Rob. 16, 21; *The Leon*, 6 P. D. 148.

(*b*) *Chartered Mercantile Bank of India, London, and China* v. *Netherlands India Steam Navigation Co.*, 10 Q. B. D. 521.

(*c*) *The Machin*, Ad. Ct. Nov. 1884.

(*d*) See further as to the law applicable in such a case, below, pp. 212—214.

(*e*) See *infra*, p. 218, note (*d*).

applies where the fault on the part of the ship is that of her compulsory pilot (*f*); and in the following cases it appears to have been held that a tug may be liable for the fault of the pilot of the tow.

In *The Mary* (*g*) it was held that a tug towing a ship in charge of a compulsory pilot was liable for a collision between the tow and a third ship caused entirely by the tug acting in obedience to the orders of the pilot, and without negligence on her own part or on the part of the officers or crew of the ship in tow. In this case, however, the value of the decision as to the liability of the tug for the pilot's negligence may be affected by the fact that the tug was herself in fault.

Where a collision between a ship in tow and a pier was caused by an improper alteration in the course of the tug, without orders from her tow, which was in charge of a compulsory pilot, it was held that the tow was liable. But here, also, it would seem that the owners of the tow would be liable at common law; for it was the duty of the tug to keep clear of the pier, even though the pilot gave no orders (*h*). The general question of liability, when one of the ships is in tow, is considered in another chapter (Ch. VIII.).

Liability for damage by a ship ashore, sunk, or abandoned.

Owners are not liable for damage caused by a ship which they have abandoned, if the abandonment was justifiable. But if the abandonment, though necessary for the safety of those on board, was the result of negligence for which the owner is responsible, it seems that he remains liable notwithstanding the abandonment (*i*). So long as a ship

(*f*) See *The Hector*, *infra*, p. 142.

(*g*) *The Mary*, 5 P. D. 14.

(*h*) *The Sinquasi*, 5 P. D. 241; see further as to the duty of the tug, *infra*, p. 198; and as to the owners not being liable for the fault of a compulsory pilot, *infra*, p. 227.

(*i*) *Brown* v. *Mallet*, 5 C. B. 599; *White* v. *Crisp*, 10 Ex. 312. These cases were decided on demurrer, and some doubt was thrown upon them in *The Douglas*, 7 P. D. 151. See also *Rex* v. *Watts*, 2 Esp. 675; *White* v. *Phillips*, 15 C. B. N. S. 245; *Dimes* v. *Petley*, 15 Q. B. 276. By abandoning to his insurers, the owner of a ship sunk so

remains in the owner's possession he is liable for damage to another ship striking her, though she is sunk or ashore, if such damage was caused by the absence of proper lights or precautions on his part. He is also liable for obstructing navigation if special damage proved. Rose v. Miles 4 M & S 101

It has been held to be the duty of those in charge of a vessel sunk in a fairway to mark her position with a buoy (*k*), and if in a tideway with a buoy that will watch (*l*). But if the owner or person in possession of the wreck proves that the wreck, though unmarked and unlit, was so through no negligence on his part, he is not liable. Thus, in *The Douglas* (*m*), it being proved that notice of the wreck had been given to the river authority having power to remove wrecks, it was held that the owner was not liable for a collision caused by the wreck being unlit. In America it has been held that no liability attached to a tug for damage caused to a third ship by her tow, which had been sunk without fault on the part of the tug (*n*). The Victoria ub

The liability of a dock, harbour, or river authority with power to remove wrecks for damage by a wreck is considered below (*o*).

Liability of dock or harbour authority.

The principle which exempts a ship and her owners from liability where the damage results entirely from the negligence of a compulsory pilot in charge of her, applies equally where the ship is being navigated under the orders of a dock or harbour-master empowered by the Legislature to direct the movements of vessels within his dock or harbour (*p*). In such cases the dock or harbour-master is

as to obstruct a harbour does not escape liability for payment of the expenses of raising the ship under 10 & 11 Vict. c. 27, s. 56; *Eglington* v. *Norman*, 46 L. J. Ex. 557.

(*k*) *Harmond* v. *Pearson*, 1 Camp. 515; *Hancock* v. *York, &c. Rail. Co.*, 10 C. B. 348; *Gilbert* v. *Corporation of Trinity House*, 17 Q. B. D. 795 (damage by stump of beacon).

(*l*) See *Joliffe* v. *Wallasey Local Board*, L. R. 9 C. P. 62.

(*m*) 7 P. D. 151.

(*n*) *The Swan*, 3 Blatchf. 285.

(*o*) pp. 99, *seq.*

(*p*) See *The Cynthia*, 2 P. D. 52; *The Excelsior*, L. R. 2 A. & E. 268. In *Edwards, Robertson & Co.* v. *Falmouth Harbour Commissioners*, *The Rhosina*, 10 P. D. 24, on app. *ib.* 131, it was assumed that the harbour authority was liable.

The Crystal 7 Asp. 513
Barraclough v Brown 1. Com. Cas. 262

liable; and the dock or harbour authority would, it seems, also be liable to the whole extent of its assets (*q*). The liability would be the same, whether the dock or harbour authority was a corporation or body trading for profit, or whether it merely had power to levy tolls and apply them towards the maintenance and improvement of the dock or harbour (*r*). Thus, for a collision in a dock caused by the improper influx or withdrawal of water, improper berthing of ships, or negligence of a dock-master in regulating the movements of a vessel in the dock, full damages might, it seems, be recovered against the proprietors or trustees of the dock (*r*). Such would appear to be the law; but, so far as the writer is aware, in no reported case has the question arisen. It may be contended that the principle of the decision in *Mersey Docks and Harbour Board* v. *Gibbs* (*s*) does not go the length here suggested. The negligence in that case consisted in the omission to remove a mud-bank upon which the ship of the plaintiff grounded, and thereby received injury. It may be thought that negligence of a dock-master causing a collision is of a different character, and that the same result as to the liability of his employers would not follow (*t*). But the opinion of the judges in *Mersey Docks and Harbour Board* v. *Gibbs*, delivered by Blackburn, J., does not suggest any such distinction, and it is submitted that there is none. In the case of a corporation having its liabilities defined or limited by statute, or of unpaid trustees of a navigable river, having no power to levy tolls, the result would be different (*u*).

Omission by harbour authority to remove wreck.

It is doubtful whether harbour and lighthouse authorities, having power under 40 & 41 Vict. c. 16, to remove vessels sunk in harbours or waters within their jurisdiction,

(*q*) The statutory limitation of liability not applying in such a case; see *infra*, pp. 171, 178.

(*r*) See *Mersey Docks and Harbour Board* v. *Gibbs*, L. R. 1 H. L. 93; *The Excelsior*, L. R. 2 A. & E. 268, 270.

(*s*) L. R. 1 H. L. 93.

(*t*) See *Metcalfe* v. *Hetherington*, 5 H. & N. 719.

(*u*) *Forbes* v. *Lea Conservancy Board*, 4 Ex. D. 116.

are liable for injury sustained by a vessel striking against a wreck which they have neglected to remove. In *The Douglas* (*x*), Brett and Cotton, L.JJ., suggested that they might be liable in such a case; but in a subsequent case, Kay, J., declined to follow this suggestion; though upon other grounds he held that in the case before him the harbour authority was liable.

The case (*y*) was as follows:—By a local Act (26 & 27 Vict. c. lxxxix.) the harbour of Barrow was vested in the Furness Railway Company; and powers were given to the company to levy rates within the limits of the harbour, and to buoy the harbour and the Piel channel leading thereto. By a subsequent Act (42 & 43 Vict. c. cxlvi.) it was provided that a moiety of the light dues payable by vessels using the harbour should be applied in (amongst other purposes) buoying and lighting the Piel channel. The plaintiff's vessel struck against the wreck of a ship sunk in Piel channel, which the defendant company had taken possession of and partially removed under the powers of the general (Wrecks Removal) Act, 40 & 41 Vict. c. 16. It was held that the company was liable for the injury sustained by the plaintiff's vessel. It was contended that the general Act, 40 & 41 Vict. c. 16, which (sects. 4, 5) enacts that harbour and lighthouse authorities in certain cases "may" remove sunken vessels, imposed a duty on the defendant company to remove the wreck, and that having wrongfully neglected to do so, they were liable for the plaintiff's loss; and a suggestion by Brett, L.J., in *The Douglas* (*z*) to this effect was cited. Kay, J., declined to hold the company liable on this ground, but held them liable on the authority of *Mersey Docks and Harbour Board* v. *Gibbs* (*a*), as being a corporation empowered to receive payments from ships entering

(*x*) 7 P. D. 151.
(*y*) *Dormont* v. *Furness Rail. Co.*, 11 Q. B. D. 496.
(*z*) 7 P. D. 151.
(*a*) L. R. 1 H. L. 93.

the harbour, part of which payments were to be applied in maintaining and buoying Piel channel.

Duty of wharfinger as to ships using wharf.

In *The Moorcock* (*b*) the duty of a wharfinger in the Thames was held to extend to warning ships using his wharf of the uneven character of the river bed alongside his wharf; and he was held liable for a ship breaking her back upon a mound of shingle alongside his wharf, upon which, at low tide, the ship necessarily grounded. In this case the river bed was not in the wharfinger's possession or under his control. In *The Calliope* (*c*) this duty was held to extend to a danger outside the berth alongside the wharf; but this decision has since been reversed (*cc*).

In *The Queen* v. *Williams* (*d*) the executive government of a colony was held liable for injury caused to a ship which lay at a wharf of which they were possessed, and for the use of which they were paid by the shipowner. The injury was done by a snag under water, of the existence of which the harbour authority, the government, were aware, but of which they gave no warning to the ship. The decision in this case followed those in *Parnaby* v. *Lancaster Canal Co.* (*e*), and *Mersey Docks and Harbour Board* v. *Gibbs* (*f*).

Liability of harbour authority for damage by harbour master.

A steamship lying in Falmouth harbour had occasion to be placed on shore to have her propeller examined. The harbour master, at the request of her owner or master, went on board and gave orders as to getting her under way with a view to beaching her. By his order the anchor was let go in an improper manner, so that the vessel grounded on it and was injured. The owners sued the harbour master and the harbour authorities as his employers.

(*b*) 13 P. D. 157; 14 P. D. 64.
(*c*) 14 P. D. 138.
(*cc*) W. N. 1890, p. 220; Dom. Proc. cf. *Wright* v. *Lethbridge*, 63 L. T. N. S. 572; *infra*, p. 102.
(*d*) 9 App. Cas. 45. See also *Parnaby* v. *Lancaster Canal Co.*, 11 A. & E. 223, as to the common law liability of a canal company for damage by sunken craft.
(*e*) 11 Ad. & El. 223.
(*f*) *Ubi supra*. In Scotland it was held, in a somewhat similar case, that no liability attached to the harbour authority: *Kidson* v. *M'Arthur*, 5 Sess. Cas. 4th Ser. 936.

Bye-laws in the usual form, made under the powers of the local Act and the general Act (10 Vict. c. 27), empowered the harbour master to regulate the movements of vessels in the harbour, and required vessels to obey his directions. It was held that the harbour master was acting in his capacity of harbour master when he gave the order to let go the anchor; that the order was a grossly wrong and negligent order; and that both he and his employers, the harbour authorities, were liable for the negligence (*g*).

In *The Apollo* (*h*), the foreman docksman, in the absence of the harbour master, gave permission, at the request of the ship's agent, to put the ship on the bottom of a lock leading into the harbour, for the purpose of freeing her propeller, which had fouled a rope. The ship was damaged through sitting upon an old dock-sill, whose existence was unknown to the foreman docksman. An action against the dock company in respect of the damage sustained was dismissed by Butt, J., and his decision was affirmed by a majority of the Court of Appeal (Lord Esher, M. R., dissenting), on the grounds that the user of the lock was extraordinary, that the plaintiffs were bare licensees, and that the foreman docksman had no authority to permit such user of the lock by them upon any other terms. Butt, J., whose judgment had proceeded on substantially the same grounds, had also found that there was contributory negligence in the master of the ship. The case is under appeal to the House of Lords.

Liability of harbour authority for insufficient moorings.

There has been no decision as to the liability of a port or harbour authority for a collision caused by the insufficiency or parting of moorings laid down by them for the use of ships. The owner of the ship which goes adrift would not, it seems, be liable in such a case (*i*), and upon

(*g*) *The Rhosina, Edwards, Robertson & Co.* v. *Falmouth Harbour Commissioners*, 10 P. D. 24; affirmed on appeal, 10 P. D. 131.

(*h*) 6 Asp. M. C. 356, 402.

(*i*) *Toward* v. *Turkistan*, Ship. Gaz. 19th Dec. 1885, where a ship fast to one of the Clyde Trustees' buoys was held not in fault for its carrying away. See also *The Wil-*

proof of negligence it would probably be held that damages could be recovered against the port authority.

Pilotage authorities not liable for negligence of licensed pilot.

It has been attempted, but without success, to make a pilotage authority liable for the negligence of a pilot licensed but not employed by them (*k*). And in a very recent case, where the deputy harbour master of the defendants was also a pilot licensed by them, and was employed by the plaintiffs to pilot their ship, which was lost by his negligence, the defendants were held free from liability on the ground that, though it was their duty to license pilots, they were not authorized by their statutes to enter into pilotage contracts, or to employ a person as pilot for a particular vessel (*l*). But in another case in Scotland, where the loss was caused by the fault of a boatman, not licensed as a pilot, employed by the harbour trustees to conduct a ship, the trustees were held liable (*m*). In some cases the Act of Parliament constituting the pilotage authority expressly provides that it shall not be liable for damage caused by negligence of pilots licensed by them (*n*).

Liability in case of a collision with one of H. M. ships.

In the case of damage done by a Queen's ship, the legal responsibility attaches to the actual wrong-doer alone (*o*). If the ship is properly in charge of an inferior officer, the captain is not liable in a civil action (*p*); nor is a pilot liable for a wrong order given by the officer in command (*q*). The appointment of all officers being with

liam Lindsay, L. R. 5 P. C. 338; *The Ambassador*, cited 2 P. D. 37; *The Monkseaton*, 14 P. D. 51.

(*k*) *Dudman* v. *Brown and Dublin Port and Docks Board*, Ir. Rep. 7 C. L. 518.

(*l*) *Shaw, Savill & Albion Co.* v. *Timaru Harbour Board*, 62 L. T. N. S. 913; 15 Ap. Ca. 429.

(*m*) *Holman* v. *Irvine Harbour Trustees*, 4 Sess. Ca. 4th ser. 406 (Rettie).

(*n*) *E. g.*, 25 Vict. c. 29 (Local), s. 43 (Brean Down); 25 Vict. c. 31 (Local), s. 65 (Berwick-upon-Tweed).

(*o*) *The Mentor*, 1 C. Rob. 179; *The Athol*, 1 W. Rob. 374; *The Volcano*, 2 W. Rob. 337; *The Birkenhead*, 3 W. Rob. 75; and *The Bellerophon*, 3 Asp. Mar. Law Cas. 58, are instances of actions against Queen's ships.

(*p*) *Nicholson* v. *Mounsey*, 15 East, 384. See *The Cybele*, 3 P. D. 8; *Wright* v. *Lethbridge*, 63 L. T. N. S. 572 (an action against a Queen's harbour master).

(*q*) *Stort* v. *Clements*, 1 Peake, 017.

the Government, the superior officer is not answerable for the acts of his subordinates.

Her Majesty's ships and public ships of foreign states are not subject to arrest (*r*). But they have frequently submitted themselves to the jurisdiction of the Admiralty Court, and upon so doing they subject themselves to the ordinary rules of law (*s*).

Whether vessels belonging to a civil department of the Government, and employed for the special purposes of the department, are entitled to the immunity from arrest enjoyed by ships of war seems doubtful (*t*).

Liability of owners of cargo.

Owners of cargo on board a ship in fault for a collision are not liable for the damage done by the ship; but we have seen that the cargo may be arrested in order to secure for the benefit of the sufferers in the collision the payment of freight due to the shipowner (*u*).

Shipowner liable, though ship lost.

The shipowner is not discharged from his liability by the sinking of his ship (*x*), though in such a case no action *in rem* can be brought in Admiralty.

Liability of part owners and joint wrong-doers.

Part owners of a ship in fault for a collision are at law severally liable as joint wrong-doers, or joint employers of the actual wrong-doer. One of them may be sued alone (*y*); but if judgment is recovered against one part

(*r*) *The Athol*, 1 W. Rob. 374; *The Comus*, 2 Dods. 464. As to ships of a foreign Sovereign which are engaged in trade, see below, p. 220. In America, Government ships are subject to Admiralty process: *The Siren*, 7 Wall. 152; *The Fidelity*, 16 Blatch. 569.

(*s*) See *The Prinz Frederick*, 2 Dods. 451; and *infra*, p. 222. For the practice, in case of collision with a Queen's ship, see Williams and Bruce, Admiralty Practice, 2nd ed. pp. 82, 250, note (*k*); Maud and Pollock on Shipping, 4th ed. 615.

(*t*) See *The Cybele*, 3 P. D. 8; *The Lord Hobart*, 2 Dods. 103.

(*u*) *Supra*, p. 81.

(*x*) *The Normandy*, L. R. 3 A. & E. 152.

(*y*) *Mitchell* v. *Tarbutt*, 5 T. R. 649. As to the liability of part owners by the civil law, see *supra*, p. 68, note (*l*). By the maritime law a part owner was liable only to the extent of his interest in the ship: Emerigon, Contr. à la grosse, Ch. IV., s. 11; Grotius de jur. belli et pacis, lib. 2, ch. 11, s. 13. *Semble*, this was once the law of the English Admiralty; see *Allens* v. *Marsh*, 2 Ventr. 181; *Gull* c. *Carswell*, *infra*, p. 148; and is now the law in France: Codes Annotées, Sirey et Gilbert, *infra*, p. 183.

owner, it seems that no action can be brought against the others, though the judgment is unsatisfied (*z*).

Contribution amongst co-owners.

The rule that there is no contribution between wrong-doers does not prevent a part owner who has been compelled to pay the whole of the damages from recovering in an action for contribution against his co-owners (*a*). And money so paid for damages, where the owner's liability is limited, may be brought into account as money disbursed for the use of the ship (*b*).

Collision between two ships owned by the same persons.

If a collision occurs between two ships belonging to the same owner, his only remedy is against the actual wrong-doer. And the case seems to be the same where the two ships have one or more part owners in common. But the owners of cargo, or passengers, on board either ship can recover in an action of tort against the shipowners, subject to this, that where both ships are to blame, and the shipowners are protected by the terms of their contract against the negligence of their servants, the right to recover is limited to half the loss sustained, and that where (as is not ordinarily the case) the protection extends to the negligence of the shipowner's servants, as well on board the carrying ship as on board other ships of the same owners, there is no right to recover at all (*c*).

(*z*) *Brinsmead* v. *Harrison*, L. R. 7 C. P. 547. As to the several liability where two ships are sued in Admiralty, see *The Atlas*, 3 Otto, 302; *The Juniata*, *ibid.* 337; *The Alabama* and *The Gamecock*, 2 Otto, 695; see *infra*, p. 196. As to the remedy against his co-owner of a part owner who has given a bond for the release of his ship, see below, p. 324.

(*a*) 1 Smith's Lead. Cas. 9th ed. p. 171.

(*b*) 17 & 18 Vict. c. 104, s. 515.

(*c*) See *Chartered Mercantile Bank of India, China, and London* v. *Netherlands India Steam Navigation Co.*, 10 Q. B. D. 521. The law as here laid down, limiting the damages recoverable, does not depend upon the doctrine of *Thorogood* v. *Bryan*, 8 C. B. 115, but upon the ancient practice of the Admiralty Court. See *The Milan*, Lush. 388, and *per* Lindley, L. J., 10 Q. B. D. 545. It would therefore seem to be unaffected by the decision in *The Bernina* (No. 2), 12 P. D. 58; 13 App. Cas. 1. See *per* the M. R., 12 P. D. at p. 83, and *infra*, p. 143. See also *The Bernina* (No. 1), 12 P. D. 36 (where the shipowners were not protected against the negligence of their servants, and were liable to cargo owners in contract), and *infra*, pp. 284.

Liability in various cases.

The liability of the shipowner as carrier upon the contract of carriage for a collision whereby goods or passengers are injured (*d*); in respect of collisions abroad (*e*); in respect of collisions with or between foreign ships, or in foreign waters (*f*); of collisions where one or both ships are in tow (*g*); where three or more ships are involved in the collision (*h*); where negligence on board one ship causes a collision between two others, or injures another ship (*i*); and in respect of damage done to a pier or harbour works (*k*), are considered elsewhere.

(*d*) p. 281, *seq.*
(*e*) p. 210, *seq.*
(*f*) p. 208, *seq.*
(*g*) p. 185, *seq.*
(*h*) p. 26.
(*i*) p. 27.
(*k*) pp. 73, 85, 178, 211.

CHAPTER IV.

PERSONS ENTITLED TO RECOVER.

ALL persons injured in their persons or property in a collision caused by the fault of one or both ships, and who have not themselves or through their agents been guilty of negligence causing the loss (*a*), are entitled to recover damages. Such persons are usually of one or other of the following classes: owners of the injured ship, whether they are registered as owners or not (*b*); passengers, master, or crew losing their clothes or effects (*c*); owners or consignees of cargo on board either ship; persons entitled under Lord Campbell's Act to recover damages for relatives killed (*d*), or persons on board either ship who are hurt in the collision (*e*); the indorsee of a bill of lading, even though the cargo has been sold (*f*); bailees, and other persons having a special property in, or temporary possession of, the ship or cargo (*g*).

Actions by part owners: consolidation of actions.

It seems that part owners of the injured ship might recover damages for their respective losses in successive

(*a*) As to the division of loss in cases where both ships are in fault, see below, p. 125.

(*b*) *The Ilos*, Sw. 100.

(*c*) *The Cumberland*, 5 L. T. N. S. 496. As to a passenger by ferry in charge of his own mare, see *Willoughby* v. *Horridge*, 12 C. B. N. S. 742.

(*d*) 9 & 10 Vict. c. 93; *infra*, pp. 122, 144. A posthumous child may recover for the loss of its father: *The George and Richard*, L. R. 3 A. & E. 466.

(*e*) As to members of the crew so hurt, see *The Borodino*, 5 L. T. N. S. 291; *Taylor* v. *Dewar*, 2 B. & S. 58.

(*f*) *The Marathon*, 40 L. T. N. S. 163.

(*g*) *The Minna*, L. R. 2 A. & E. 97. In an American case full damages were recovered for a collision, although all interest in the injured ship had been transferred to a foreigner, whereby the ship was forfeited to the State: *The Nabob*, Brown, Ad. 115.

actions (*h*); and the defendant would not, it seems, be entitled to have the other co-owners added as plaintiffs, at any rate without their consent in writing, nor to have the proceedings stayed until this was done, so that he should not be vexed by more than one action (*i*). If a part owner dies after the collision and before action brought, the right of action survives to the other part owners (*k*).

Underwriters must sue in name of assured.

The underwriters upon a ship, A., sunk by collision with B., cannot sue B. or her owners in their own names. Their only right of action is by subrogation to the rights of the owners of A.; and they must sue in the names of the owners of A. (*l*).

Person or owner of goods on board ship in fault can recover.

There was formerly doubt whether a person injured on board a ship which is herself in fault can recover at common law. This doubt, originating in the well-known case of *Thorogood* v. *Bryan* (*m*), has lately been set at rest by the House of Lords in *The Bernina* (No. 2) (*n*). *Thorogood* v. *Bryan* was there overruled. It had never been recognized as law in the Court of Admiralty, Dr. Lushington having held that, *Thorogood* v. *Bryan* notwithstanding, the owners of cargo on board a ship in fault could recover half their loss against the other ship being also in fault (*o*).

Thorogood v. *Bryan*.

Thorogood v. *Bryan* was decided in 1849 by a very strong Court (Coltman, Vaughan, Williams, Maule, Cresswell, JJ.). It held that the representatives of a passenger in an omnibus, who was killed by the combined

(*h*) *Addison* v. *Overend*, 6 T. R. 766; *Sedgworth* v. *Overend*, 7 T. R. 280.

(*i*) Ord. XVI. rr. 2, 11. *Jackson* v. *Kruger*, 54 L. J. Q. B. 446; *Tryon* v. *The National Provident Institution*, 16 Q. B. D. 167.

(*k*) See *Rex* v. *Collector of Customs*, 2 M. & S. 225; *Martin* v. *Crompe*, 1 Ld. Raymond, 340.

(*l*) *Simpson* v. *Thompson*, 3 App. Cas. 279.

(*m*) 8 C. B. 115; *Cattlin* v. *Hills*, *ibid.*; 1 Smith's Leading Cases, 8th ed. 316. See also *Armstrong* v. *Lancashire & Yorkshire Rail. Co.*, L. R. 10 Ex. 47; *Adams* v. *Glasgow & S. W. Rail. Co.*, 3 Sess. Cas. 4th ser. 215.

(*n*) Nom. *Mills* v. *Armstrong*, 13 App. Cas. 1; in Courts below, 12 P. D. 58; 11 P. D. 31; followed in *Mathews* v. *London Street Tramways Co.*, 58 L. J. Q. B. 12.

(*o*) *The Milan*, Lush. 388; *The City of Manchester*, 5 P. D. 3; *ib.* 221.

negligence of the driver of the carrying omnibus and the driver of another omnibus, could not recover against the employer of the latter driver. The negligence in the carrying omnibus consisted in setting the passenger down in the middle of the street, and not drawing up to the kerb; the negligence in the other omnibus was carelessly driving over the passenger after he had been set down. The ground of the decision was that the passenger was "identified" with the driver of his own omnibus in the matter of negligence, and therefore, having by his own (*i. e.* his driver's) negligence partly caused the accident, he could recover nothing. This case, though often questioned, did not come before a higher Court for review until 1888, when *The Bernina* (nom. *Mills* v. *Armstrong*) came before the House of Lords. In the Courts below, Butt, J. (11 P. D. 31), had reluctantly followed *Thorogood* v. *Bryan;* the Court of Appeal (12 P. D. 58) reversed the decision of Butt, J.; and the House of Lords (Lords Herschell, Watson, Macnaghten, and Bramwell, the latter with some doubt), affirmed the decision of the Court of Appeal. The facts in *The Bernina* were that Toeg, a passenger, and Armstrong, an engineer on board *The Bushire*, were killed in a collision between *The Bernina* and *The Bushire*, caused by faults in both vessels, but without fault in Armstrong or Toeg. It was held that the representatives of Toeg and Armstrong could recover full damages against the owners of *The Bernina*. Lords Herschell and Watson delivered opinions strongly against the identification theory upon which *Thorogood* v. *Bryan* was decided. Lord Bramwell was of opinion that *Thorogood* v. *Bryan* was rightly decided upon a point of pleading, namely, that whereas the plaintiff alleged that the defendant's negligence caused the injury, the fact was that the accident would not have happened but for the negligence of the driver of the carrying omnibus. Having been decided upon the point of pleading, Lord Bramwell held that *Thorogood* v. *Bryan*

The Bernina.

was not an authority in the case of *The Bernina*. As to the "identification" theory, Lord Bramwell thought that it was intended to express the idea that a person who contracts with another to be carried without negligence has not a right of action against a third party by whose negligent act, combined with a separate negligent act of the contracting carrier, the passenger is injured. This idea the learned lord found difficulty in deciding to be unfounded in law. He considered that the decision of the House involved the overruling of *Waite* v. *North Eastern Rail. Co.* (*p*), as well as *Thorogood* v. *Bryan*, so far as the latter case depended upon the identification theory.

Shipowner's liability to crew.

A servant cannot recover against his employer for injury sustained in the course of his employment through the negligence of a fellow-servant (*q*). It seems, therefore, that the ship's officers and crew cannot recover against the shipowner for injury suffered in a collision caused by one of themselves (*r*), except, perhaps, where the wrong-doer is the captain (*s*). But a compulsory pilot is not a servant of the shipowner, and the rule above stated does not prevent him from recovering against the owner (*t*).

(*p*) E. B. & E. 719.

(*q*) *Priestly* v. *Fowler*, 3 M. & W. 1; Chitty on Contr. 10th ed. 537. See *Wilson* v. *Merry*, L. R. 1 Sc. App. 326. The Employers' Liability Act, 1880, does not apply to seamen or apprentices to sea service, or, it seems, to an officer. See 43 & 44 Vict. c. 42, s. 8; 38 & 39 Vict. c. 90, ss. 10, 13.

(*r*) *Leddy* v. *Gibson*, 11 Sess. Cas. 3rd ser. 304.

(*s*) *Ramsay* v. *Quinn*, Ir. Rep. 8 C. L. 322.

(*t*) *Smith* v. *Steele*, L. R. 10 Q. B. 125.

G.R. contribution is not recoverable from wrong doer The Marpesa 7 Ref. 155
Tender after judgment no use. Recepta 1893 P. 255.
Tender does not bind the tenderer to pay the amount tendered if a less sum is found due The Medina 1894 P 264.

CHAPTER V. Oxxii r.5 does not apply

DAMAGES.

What damages may be recovered; general rule.

THE wrong-doer in a collision is liable for all the reasonable consequences of his negligence—"such damages as flow directly and in the usual course of things from the wrongful act" (*a*). This is the general principle, and where the damages claimed are in respect of loss or injury to ship or goods, occurring at, or immediately after, the collision, there is little difficulty in applying the rule. But where the loss, though consequent upon and connected with the defendant's negligent act, was not immediately caused by it, there is often great difficulty in determining whether damages in respect of such loss can be recovered as having been caused by the negligence. The question is closely connected with that discussed in a former chapter as to the legal consequences of negligence.

Assuming that there is a good cause of action, there is a difficulty in many cases of determining the measure of damages, and the proper items to be taken into account in estimating them. As similar facts giving rise to similar claims for damages are constantly recurring in collision actions, it will be convenient to collect the decisions upon this subject.

Restitutio in integrum.

The general rule was thus stated by Dr. Lushington in

(*a*) *Per* Bowen, L. J., *The Argentino*, 13 P. D. 191, 201; in Dom. Proc. 14 App. Cas. 519; *The Notting Hill*, 9 P. D. 105; *Victorian Railway Commissioners* v. *Coultas*, 13 App. Cas. 222. The "usual course of things" includes the probable and reasonable conduct of those on board a ship in collision: *The City of Lincoln*, 15 P. D. 15, 18.

The Clarence (*b*):—"The party who has sustained a damage by collision is entitled to be put, as far as practicable, in the same condition as if the injury had not been suffered." This appears to be the meaning of the phrase used in some of the cases that the sufferer is entitled to *restitutio in integrum* (*c*). There is no difference between the Admiralty and common law rules as to what damages are recoverable (*d*). He is equally entitled to be paid the cost of the repairs, though he has become bankrupt since they were executed, and has not paid the shipwright who executed them (*e*).

Cost of repairs.

The owner of a ship wrongfully injured in a collision is entitled to have her fully and completely repaired; and if the necessary consequence of this is, that the value of the ship is increased, so that the owner receives more than an indemnity for his loss, he is entitled to that benefit. No deduction is made from the damages recoverable on account of the increased value of the ship, or the substitution of new for old materials (*f*). In this respect the owner of a ship injured by collision is in a different position from an owner claiming his indemnity under the ordinary marine policy of insurance (*g*).

Interest on the value of the ship, if she is lost.

If the ship is totally lost the owner is entitled to recover her market value at the time of the collision (*h*), with interest from the day of the collision if the ship was not earning freight. If she was earning freight he is entitled to the estimated value of the ship at the end of her voyage,

(*b*) 3 W. Rob. 283, 285.

(*c*) *E. g.*, by Dr. Lushington in *The Inflexible*, Swab. 200; *The Clyde*, Swab. 23; *The Ironmaster*, Swab. 441; *The Columbus*, 3 W. Rob. 158; *The Gazelle*, 2 W. Rob. 279, 280; cited by Sir R. Phillimore in *The Halley*, L. R. 2 A. & E. 3, 7; and see 1 P. D. 471.

(*d*) *The Argentino*, 13 P. D. 191, 195, 200.

(*e*) *The Endeavour*, 62 L. T. N. S. 840.

(*f*) *The Pactolus*, Swab. 173; *The Gazelle*, 2 W. Rob. 279: *The Bernina* (No. 3), 6 Asp. M. L. C. 65; and see *The Star of India*, 1 P. D. 466, 471.

(*g*) As to the rule of "one-third new for old" in insurance cases, see *Lohre* v. *Aitchison*, 3 Q. B. D. 558; on app., 4 App. Cas. 755.

(*h*) *The Clyde*, Swab. Ad. 23; *The Ironmaster*, *ibid.* 441; *The Columbus*, 3 W. Rob. 158; *The Clarence*, 3 W. Rob. 283.

On freight, if freight was being earned.

together with the freight she would have earned, less the cost of completing the voyage, and interest on the whole from the probable end of the voyage. If payment is made before that time an allowance is made for discount. If, however, the plaintiff's loss exceeds the amount of the defendant's statutory liability, interest runs from the date of the collision, whether freight was being earned or not (*i*).

The Admiralty practice as to allowing interest on damages applies to common law actions which, before the Judicature Acts, the Admiralty Court had not, but which the Admiralty Division has, jurisdiction to entertain; also to actions transferred by consent to the Admiralty Division (*j*).

Loss of injured ship after collision presumed to have been caused by collision.

Where the ship is damaged but not sunk in the collision, and she afterwards receives further injury or is totally lost, the presumption ordinarily is that the subsequent injury or loss was caused by the defendant's negligence, and the burden is upon the wrong-doer in the collision to prove that it was not so caused.

Where a ship was partially disabled in a collision for which she was not in fault, and subsequently drove ashore in consequence of the parting of her cable, it was held that the ship in fault for the collision was liable for the loss by the stranding (*k*). In this case Dr. Lushington said: "It is admitted that *The Pensher* is to blame for the collision, and the consequence of this is, that all the damage arising from the collision must be borne by *The Pensher*, unless it can be shown by clear and positive evidence that any part of that subsequent damage arose from gross negligence or

(*i*) For a full statement by Sir R. Phillimore of the principle upon which compensation to the injured party is made in cases of collision, see *The Northumbria*, L. R. 3 A. & E. 6, 12; see also *The Canada*, Lush. 586; *The Clyde*, Swab. 23; *The Ironmaster*, *ibid.* 44; *The Columbus*, 3 W. Rob. 158; *The Clarence*, *ibid.* 283.

(*j*) *The Gertrude; The Baron Aberdare*, 12 P. D. 204; 13 P. D. 105.

(*k*) *The Pensher*, Swab. Adm. 211, 213; *The Govino*, 5 Quebec, L. R. 57.

great want of skill on the part of those on board the vessel damaged."

In another case (*l*), *The Mellona*, a ship claiming damages against the ship with which she had been in collision, had gone ashore after the collision, in consequence of having been disabled in the collision, and was totally lost. For the other ship it was contended that *The Mellona* need not have gone ashore if she had been hove to, and proper skill had been shown by those on board. It was held that *primâ facie* the loss was attributable to the collision. Dr. Lushington said that where one vessel is found in fault for a collision, and the other is subsequently lost, the presumption of law is that the latter was lost in consequence of the collision. "In all questions of this description that is the *primâ facie* presumption; and great, indeed, would be the inconvenience, and still greater the difficulty, if, in all cases of this kind when the vessel did not go down immediately, but was subsequently lost, the Court had to enter into an investigation whether all the measures adopted on board the damaged vessel were right, or whether, if other measures had been pursued, the vessel might not have been saved" (*m*).

In another case a ship was run into whilst brought up and riding with two anchors down. One cable having parted in the collision, the other failed to hold her, and she drove ashore. It was held that the loss from her going ashore was recoverable as damages in the collision action (*n*).

So where, bad weather having come on, the injured ship went ashore twenty-one hours after the collision, the representatives of some of the crew who were drowned, but who might have been saved if they had gone on board

(*l*) *The Mellona*, 3 W. Rob. 7, 13.
(*m*) See also *The Linda*, Swab. Ad. 306; 30 L. T. 234; 4 Jur. N. S. 146.
(*n*) *The Despatch*, 14 Moo. P. C. C. 83; *The Maid of Kent*, 6 P. D. 178.

other vessels which offered assistance after the collision, were held entitled to recover against the wrong-doing ship (*o*).

A steamship in the North Sea ran into and cut off the quarter of *The Albatross*, a barque. The barque's binnacle compass, log line, log glass, and working charts were lost in the collision, and her hull was damaged, so that she was partly unmanageable. Those on board tried to take her into the Thames with a spare compass. Without negligence on their part, and in consequence of the loss of their chart and the damaged condition of the hull, she went ashore and was lost. It was held that the steamship owners were liable for her loss (*p*).

Those on board the injured ship must exhibit ordinary skill and courage in standing by her.

But the fact of a ship being injured by the negligence of another does not justify those on board in neglecting to take all reasonable measures to save the ship, and lessen the effects of the collision. They must exhibit ordinary courage in standing by their vessel, and show proper skill and seamanship according to the circumstances of the case. The Court, however, will make reasonable allowance for the excitement which usually attends a collision, and those on board will not be expected to be so acute in their judgment, or to act with the same skill and coolness, as if there had been no collision (*q*).

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They must take assistance, if necessary.

Where the injured ship went ashore and those in charge wilfully refused assistance to get her off, it was held that her owners could not recover for loss arising from the obstinacy of those on board (*r*).

Unjustifiable abandonment.

If the injured vessel is abandoned unjustifiably, the other vessel, though in fault for the collision, is not liable

(*o*) *The George* and *The Richard*, L. R. 3 A. & E. 466. See also as to this subject *per* Martin, B., in *Wilson* v. *Newport Dock Co.*, L. R. 1 Ex. 177, 187.

(*p*) *The City of Lincoln*, 15 P. D. 15.

(*q*) *The Hannah Park* and *The Lena*, 2 Mar. Law Cas. O. S. 345; *The Thuringia*, 1 Asp. Mar. Law Cas. 283.

(*r*) *The Flying Fish*, Br. & Lush. 436; 2 Mar. Law Cas. O. S. 221.

for a total loss, but only for the actual damage done in the collision (*s*).

The question whether the abandonment of a ship injured by collision was justifiable is for the Court to decide upon the particular circumstances of each case. In considering it the Court will not be exacting in requiring those on board to stand by her. In *The Blenheim* (*t*) Dr. Lushington said: "When a collision takes place on a dark night, particularly at a tempestuous period of the year, and when the vessel producing the collision is of greater burden than the one struck, I cannot possibly settle with satisfaction to my own mind, or security to justice, what ought to be the reasonable extent of fear and apprehension to the crew of the vessel so struck. It is impossible for any Court of justice to say, with any degree of certainty, what are the precise circumstances that would justify the abandonment of a vessel. If there be any reasonable prospect that the lives of the crew are endangered, I have determined, and I will do so, until I am overruled, that they are justified in quitting the vessel, and the consequences must fall on the wrong-doer" (*u*).

If a ship is improperly abandoned after a collision, her owner will not be entitled to recover as damage caused by the collision, either the value of the ship, or salvage expenses payable upon her being brought into port (*x*).

The Thuringia, a steamship which had been run down by the fault of another vessel, was improperly abandoned, and subsequently sank. It was held that she could recover no more than the expense which would have been incurred in making good the damage caused by the collision (*y*). The collision occurred sixteen or eighteen miles from Heligoland in fine weather; the ship remained afloat three

(*s*) *The Thuringia, ubi supra.*
(*t*) 1 Spinks' E. & A. 285, 289.
(*u*) See also *The Linda*, Sw. 306; 30 L. T. 224; *The Hope* and *The Chili*, 2 Mar. Law Cas. O. S. Dig. 546; *The Lindsay*, Ir. Rep. Ad. 1 Eq. 259.
(*x*) *The Linda*, Swab. Ad. 306.
(*y*) *The Thuringia*, 1 Asp. Mar. Law Cas. 283.

hours after the collision, and might have been taken to Heligoland.

Neglect to repair injury received in the collision.

In another case (*s*) no attempt was made to repair the damage received in the collision, such damage consisting in a small hole which might easily have been stopped. In consequence of the hole being left unstopped the cargo was injured by water. It was held that the cargo owner could not recover damages against the other ship, although she was in fault for the collision. The duty of the master of the injured ship to take proper steps to preserve, and, under some circumstances, to sell, an injured cargo, has been considered in several cases (*a*). It was held negligence in a master not to have discharged a cargo of beans which were wetted in a collision (*b*). Where a cargo was damaged partly by the collision and partly by the master's negligence in not carrying it on to the port of discharge without delay, it was held that damages for loss arising from the latter cause were not recoverable in the collision action (*c*). The Court will not, upon the application of the owner of a ship damaged in collision, order her sale (*d*).

Neglect to beach.

A steamship at anchor in the Elbe (800 feet wide) was run into by the negligence of another ship. It was held that her owners were not entitled to recover as damages the cost of raising her. She sank some hours after the collision, and no water reached the engine room for half an hour after the collision. There was evidence that she might and ought to have been beached (*e*).

Owner not required to raise ship sunk in collision.

But where a ship is sunk at sea by collision, there is no obligation upon the owner to raise her, even if it would be possible to do so (*f*). If he elects to raise her, and it turns

(*s*) *The Eolides*, 3 Hag. 367.
(*a*) See *Cargo ex Argos*, L. R. 5 P. C. 134, 165; and cases there cited.
(*b*) *Notara* v. *Henderson*, L. R. 7 Q. B. 225; and see *The Elina*, 5 P. D. 237, note; *The Bernina*, 12 P. D. 36; 13 App. Cas. 1.
(*c*) *The Elina*, 5 P. D. 237, note.
(*d*) *The Wexford*, 13 P. D. 8.
(*e*) *The Hansa*, 6 Asp. M. C. 268.
(*f*) *The Columbus*, 3 W. Rob. 158. The principles of abandonment as applied in insurance cases do not apply in collision cases; *ibid.* 165.

out, upon a survey, that she is not worth repairing, he is entitled to recover as damages the expense of raising and docking her, less her value in the dock (*g*). If he repairs her at a cost exceeding her value before collision, he cannot recover the cost of repairs beyond such value; nor anything in the nature of demurrage (*h*). If, acting as a prudent owner, he elects not to repair, and sells her, he is entitled to recover her value at the time of collision, less the proceeds of sale, together with interest from the date of the collision (*i*).

Damages increased by plaintiff's negligence after collision.

Damages for loss occurring during, or after, and in consequence of, the collision, but caused partly by negligence of the plaintiff, cannot be recovered as having resulted entirely from the defendants' negligence which caused the collision. Where, by the omission to cut a lanyard which held together two ships which had been in collision, the damage was increased, it was held to have been caused partly by the plaintiff's negligence in not cutting the lanyard (*k*). So damage to one vessel by the fluke of the other's anchor was held to have been caused by the negligence of both ships, though the collision was caused entirely by the fault of the injured vessel, the circumstances being such that the collision would have been harmless but for the fact that the other vessel's anchor was in an improper position (*l*).

Damage increased by weak state of injured vessel.

If the damage received in a collision is greater than would ordinarily be the case because the injured ship was in a weak condition, the other is not the less liable for the entire loss, if she is in fault for the collision. The principle is, that if a part of the damage was clearly attributable to the wrongdoer, and it is impossible to draw the line with precision, and to say how much, the wrongdoer must make good the whole loss (*m*); but where the damage occasioned

(*g*) *The Empress Eugenie*, Lush. 138.
(*h*) *Ibid.*
(*i*) *The South Sea*, Swab. Ad. 141.
(*k*) *The Massachusetts*, 1 W. Rob. 371; see also *The Flying Fish*, Br. & Lush. 436; *Grill* v. *General Iron Screw Collier Co.*, L. R. 1 C. P. 600; *ibid.* 3 C. P. 476.
(*l*) *The Margaret*, 6 P. D. 76; cf. *The Scotia*, 63 L. T. N. S. 324.
(*m*) *The Egyptian*, 2 Mar. Law

by the collision can be easily discriminated, defects disclosed in consequence of the collision, though existing prior to it, cannot be charged against the defendant (*n*).

Consequential damages.

What have been called consequential damages—that is to say, damages beyond the value of the ship or the cost of repairs—may in some cases be recovered (*o*).

Loss of expected salvage.

Where a smack was run down whilst engaged in performing a salvage service, she recovered the sum she would have received as salvage reward had she not been prevented from completing the service (*p*).

Loss of freight.

So freight which the injured ship is at the time of the collision engaged in earning, or under contract to earn, less the charges which would have been incurred in earning it, together with interest from the probable termination of the voyage, is always allowed as damages (*q*). "Loss by contact is, amongst other things, loss of the freight which the ship would have earned if she had not been crippled by the collision" (*r*). Where a ship was run down whilst on a voyage to Norway to bring home a cargo of lobsters, and another ship was taken up for the purpose, it was held that the freight of the lobsters was recoverable as consequential damages (*s*).

So the increase in value of cargo on board and belonging to the owner of the injured ship, which would have arisen had the cargo been carried to the port of discharge, and which by the collision the owner is prevented from earning, may be recovered as damages in the collision action (*t*).

Cas. O. S. 56; *The Bernina* (No. 3), 6 Asp. M. C. 65; *The Sam Gaty*, 5 Bissel, 190 (Amer. case). But see *The Albert Edward*, 44 L. J. Ad. 49 (damage to a mooring dolphin too weak to bear an ordinary strain).

(*n*) *The Princess*, 5 Asp. M. C. 451.

(*o*) As to whether the question of consequential damages is for the Court or the registrar and merchants, see below, pp. 323, 324.

(*p*) *The Betsey Caines*, 2 Hagg. Ad. 28.

(*q*) *The Northumbria*, L. R. 3 A. & E. 6.

(*r*) *Per* Erle, C. J., *Heard* v. *Holman*, 19 C. B. N. S. 1, 10. As to the cost of carrying goods to their destination, see *Rose* v. *Miles*, 4 M. & S. 101.

(*s*) *The Yorkshireman*, 2 Hagg. Ad. 30, note.

(*t*) *The Thyatira*, 8 P. D. 155.

Costs of defending suit by Harbour Authority against ship sunk in collision recoverable from wrong doer.
Blythewood
Sy. Feb 23, 94.

Salvage expenses.

If the injured ship sinks in consequence of the collision, the expenses of raising and docking her are recoverable as damages (*u*). And salvage or towage (*x*) expenses, whether incurred by the owner, or paid by him to salvors, are recoverable as damages, if they are incurred properly, and are in consequence of injury received in the collision (*y*). And the costs of both parties in a salvage action have been recovered (*z*); but in a later case some doubt was thrown upon this decision (*a*). The expense of bail in a salvage action is clearly not recoverable (*b*).

Cost of detaining officers and crew.

The cost of detaining the ship's officers whilst the ship was being repaired has been allowed as damages, where it was proved that the custom of the trade was not to discharge the officers at the end of the voyage (*c*). In America the cost of detaining the crew after the collision, and of attempts to save the cargo, has been allowed (*d*).

Diminished market value.

Where it was proved that the market value of a yacht sunk in a collision was diminished, it was held in Ireland that in addition to the sum required for repairs, the difference between her market value before and after the collision was recoverable as damages (*e*).

Demurrage.

Where the owners suffer loss by the enforced idleness of their ship which has been injured in a collision, demurrage is allowed by way of damages whilst the necessary repairs are being effected. And demurrage runs whilst the ship is detained for the transaction of business connected with the collision, such as making a protest and obtaining the necessary official documents (*f*).

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(*u*) *The Empress Eugenie*, Lush. 188.

(*x*) *The Inflexible*, Sw. 200.

(*y*) *The Linda*, Swab. 306; *The Diana*, 2 Asp. Mar. Law Cas. 366; *The Williamina*, 3 P. D. 97, 99.

(*z*) *The Legatus*, Swab. 168. Notwithstanding *Tindall* v. *Bell*, 11 M. & W. 228, it is not necessary that the defendant in the salvage action should in all cases make a tender, so as to entitle him to the costs of the salvage action from the wrong-doer in the collision.

(*a*) *The British Commerce*, 9 P. D. 128.

(*b*) *Ibid.*

(*c*) *The Inflexible*, Swab. 200.

(*d*) *Hoffman* v. *Union Ferry of Brooklyn*, 68 New York Rep. 385.

(*e*) *The Georgiana* and *The Anglican*, 21 W. Rob. 280.

(*f*) *The City of Buenos Ayres*, 1 Asp. Mar. Law Cas. 169; *The Clarence*, 3 W. Rob. 283; *The Inflexible*, Swab. 200; *The Star of*

Where damages are estimated upon the footing of a total loss, although in fact the ship is subsequently saved and repaired, with the exceptions mentioned above, no more than the ship's value at the time of the collision can be recovered. In such a case nothing will be allowed for, or in the nature of, demurrage (*g*).

In some of the cases (*h*) where damages were allowed in respect of the loss of a specific voyage, demurrage during the probable duration of the voyage appears to have been allowed; this was clearly wrong (*i*).

Loss of charter-party.

Where, in consequence of the collision, a vessel lost the benefit of a charter, damages were allowed for the loss of the charter-party in addition to demurrage (*k*).

The principle upon which loss of a charter is allowed as damages is that the value of the charter is an accurate measure of the value of the ship to the owner during the time she is under repair, or is otherwise by reason of the collision prevented from earning money or being of use to her owner. Where at the time of the collision there is no existing charter, but there is a contract under which the ship is engaged to sail upon a profitable voyage, the probable earnings of the ship under the contract will be allowed as damages. *The Argentino*, at the date of the collision, was under an engagement to take in a cargo at Antwerp for Batoum, taking the place of one of a line of ships advertised to sail between Antwerp and Batoum. It was held by the House of Lords, affirming the decision of Bowen and Lindley, L.JJ. (diss. Lord Esher, M.R.),

India, 1 P. D. 466. As to demurrage where the injured ship is one of a line advertised to sail at fixed dates, see *The Black Prince*, Lush. 568. In *The City of Peking*, 15 Ap. Ca. 438, a claim for demurrage, whilst a substituted vessel belonging to the same owners did the work of the injured vessel, was disallowed. In an appeal to the Privy Council, in order to save expense, a claim for the expenses of the injured vessel whilst in port was referred to the registrar of Her Majesty in Ecclesiastical and Admiralty Appeals, and not to the registrar of the Court below. As to the usual rate of demurrage, see *The City of Buenos Ayres*, *ubi sup.*

(*g*) *The Columbus*, 3 W. Rob. 158.

(*h*) *The Star of India*, 1 P. D. 466; *The Consett*, 5 P. D. 229.

(*i*) *The Argentino*, 14 App. Cas. 519, 523.

(*k*) *The Star of India*, *ubi supra*; *The Consett*, *ubi supra*.

that there should be allowed as damages by the collision "the ordinary and fair earnings of such a ship as *The Argentino*, having regard to the fact that she was put up as one of W. and L.'s line of steamers trading to the Black Sea, and advertised as such" (*l*).

Loss of fishing voyage.

A fishing smack recovered, besides the value of her nets and gear which she was obliged to cut adrift, the amount she might reasonably have expected to earn during the rest of the season (*m*). But it was held by Sir J. Hannen in a recent case that, where the boat is totally lost (in the case before the Court she was a French boat sunk by collision on the banks of Newfoundland), the prospective catch of fish could not be recovered, and the damages were confined to the value of the boat and gear (*n*).

Remoteness of damage.

Damages which, although consequent upon the collision, do not immediately or necessarily flow from it, cannot be recovered against the ship in fault for the collision (*o*). Where the master and part-owner of a vessel lost by collision claimed his probable future earnings as master, and profits as part-owner, it was held that he was entitled to nothing more, by way of damages, than the value of the ship at the time of the collision (*p*). And where a vessel put into port for repairs necessitated by collision, and her cargo of fruit was necessarily discharged to enable the repairs to be made, and reloaded, damage occasioned partly by handling and partly by natural decay during the delay was held not to be damage "consequent upon collision," within the meaning of a policy of insurance (*q*).

Loss of market.

It has never been the practice to give damages for loss

(*l*) *The Argentino*, 13 P. D. 191; 14 App. Cas. 519.

(*m*) *The Gleaner*, 3 Asp. Mar. Law Cas. 582; *The Clarence*, 3 W. Rob. 283, 286; *The Risoluto*, 8 P. D. 109. In Roman law *aliter*, D. 9, 2, 29, 3.

(*n*) *The City of Rome*, Ad. Div. 11th May, 1887.

(*o*) As to remoteness of damages, see Mayne on Damages, 3rd ed. 40 *seq.*; 2 Smith's L. C., 9th ed. 588 *seq.*; and *per* Martin, B., in *Wilson* v. *Newport Dock Co.*, L. R. 1 Ex. 177, 187. As to whether remoteness is a question for the registrar or the Court, see *infra*, p. 324.

(*p*) *The Columbus*, 3 W. Rob. 158; and see *The Clarence*, *ibid.* 283. As to probable catch of fish, Abordage, Nautique, Caumont, s. 148.

(*q*) *Pink* v. *Fleming*, 25 Q. B. D. 396.

of market for cargo on board a ship injured by collision (*r*). The difference between the price of the goods when they arrive at the port of discharge and the price when they ought to have arrived, and but for the collision would have arrived, is so uncertain that it cannot be held to be the reasonable consequence of the collision. It has been suggested that there is a distinction between an action for tort and an action upon the contract of carriage, and that damages for loss of market may be recovered in the former but not in the latter form of action. There seems to be no ground for such a distinction (*s*).

Damages for loss of life.

Damages for loss of life are recoverable under Lord Campbell's Act (*t*) by the relatives or legal personal representatives of persons killed in a collision in a personal action against the person liable, but not in proceedings *in rem* (*u*).

Damages in proceedings by Board of Trade.

Under 17 & 18 Vict. c. 104, the Board of Trade has power to institute proceedings for the recovery of damages for loss of life or personal injury. Damages recovered in such proceedings are assessed at 30*l.* for each case of death or injury, and are payable in priority to other claims. This, however, is not the limit of the owner's liability. The full amount to which he is liable under 25 & 26 Vict. c. 63, s. 54, can be recovered in proceedings, either by the Board of Trade or by any person dissatisfied with the amount recovered in the Board of Trade proceedings. If the amount of the owner's statutory liability is insufficient to provide damages at the rate of 30*l.* for each claimant, the claims abate rateably (*x*).

(*r*) *The Parana*, 2 P. D. 118, 124; *The Notting Hill*, 9 P. D. 105; *Smith* v. *Condry*, 1 How. 28; *The Jos. W. Dyer* v. *National Steamship Co.*, 14 Blatchf. 483. See, however, *France* v. *Gaudet*, L. R. 6 Q. B. 199, where the price of goods contracted to be sold at a profit was recovered in an action for conversion.

(*s*) *The Notting Hill*, *ubi supra*.

(*t*) 9 & 10 Vict. c. 93; 27 & 28 Vict. c. 95. As to assessment of damages by a jury in the Admiralty Division, see *The Orwell*, 13 P. D. 80.

(*u*) See below, p. 144.

(*x*) See 17 & 18 Vict. c. 104, ss. 507—516; 25 & 26 Vict. c. 63, s. 56; *Glaholm* v. *Barker*, L. R. 2 Eq. 598; S. C., L. R. 1 Ch. 223; see also *The Franconia*, 2 P. D.

A penalty of 50*l.* in addition to damages can be recovered against a ship that injures a light-ship (*y*). Penalty for injuring a light-ship.

Full damages may be recovered by the injured party though he has been compensated for the whole or part of his loss by his insurers (*z*). But, as will be seen below (*a*), he will hold such damages as he may recover, to the extent of the sum received from his insurers, in trust for his insurers. Damages where loss paid by insurers.

Damages recoverable by a cargo-owner, or by a passenger, upon the contract of carriage, are such as "a man when making the contract would contemplate would flow from a breach of it" (*b*). This somewhat vague rule is the only one to be extracted from the cases. It is beyond the scope of this work to discuss the general subject, and it is sufficient here to state that a breach of the contract of carriage, consisting in negligence of the carrier causing collision and loss of the goods carried, has the same effect as regards liability to damages as a breach of the contract in any other respect (*c*). Damages recoverable by cargo-owner upon the contract of carriage.

The shipowner's general liability as carrier is considered elsewhere (*d*).

The rule as to division of loss where both ships are in fault, whilst it extends the right to recover damages by superseding the common law doctrine of contributory negligence, also limits the amount of damages recoverable to one-half the claimant's loss. In the case of an owner of cargo on board one ship suing the other in tort, it abridges to this extent his common law right to recover Effect of the rule as to division of loss upon the amount of damages recoverable.

163, 166. It is believed that proceedings under this Act have been taken once only, in the case of *The John*.

(*y*) 17 & 18 Vict. c. 104, s. 414.

(*z*) *Yates* v. *Whyte*, 4 B. N. C. 272; *Bradburn* v. *Great Western Rail. Co.*, L. R. 10 Ex. 1.

(*a*) P. 295.

(*b*) *Per* Blackburn, J., *Hobbs* v. *London & S. W. Rail. Co.*, L. R. 10 Q. B. 111, 121.

(*c*) As to the subject generally, see Mayne on Damages, 4th ed. pp. 12 *seq.*; Sedgwick on Damages, 7th ed. vol. 1, 431 *seq.*; vol. 2, 91 *seq.* *The Parana*, 1 P. D. 452; 2 P. D. 118; *McMahon* v. *Field*, 7 Q. B. D. 591; *Lilley* v. *Doubleday*, *ib.* 510, are amongst the later cases on the subject.

(*d*) *Infra*, p. 281.

full damages. But it does not affect his right to recover full damages upon the contract of carriage (*e*). And if part of the loss has been recovered in damages against the owner of the carrying ship, the balance up to one-half the loss may be recovered against the other ship (*f*). The effect of the rule as to division of loss is fully considered in another chapter (*g*).

The Acts limiting the shipowner's liability largely affect the amount of damages recoverable by the sufferer in a collision. These enactments also are fully considered in another chapter (*h*).

(*e*) See *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, 9 Q. B. D. 118; 10 Q. B. D. 521; *The Bushire*, 5 Asp. M. L. C. 416.

(*f*) *The Demetrius*, L. R. 3 A. & E. 523.

(*g*) *Infra*, p. 125.

(*h*) *Infra*, p. 161.

CHAPTER VI.

THE RULE AS TO DIVISION OF LOSS.

The four cases of collision.

For the purpose of determining by whom and in what shares the loss is to be borne, collisions between ships have been divided into four classes. "In the first place it (collision) may happen without blame being imputable to either party, as where the loss is occasioned by a storm or other *vis major*. In that case the misfortune must be borne by the party on whom it happens to light, the other not being responsible to him in any degree. Secondly, a misfortune of this kind may arise where both parties are to blame—where there has been want of due diligence or of skill on both sides. In such a case the rule of law is that the loss must be apportioned between them, as having been occasioned by the fault of both of them. Thirdly, it may happen by the misconduct of the suffering party only; and then the rule is that the sufferer must bear his own burden. Lastly, it may have been the fault of the ship which ran the other down; and in this case the innocent party would be entitled to an entire compensation from the other" (*a*).

The dictum of Lord Stowell is here cited as a clear statement of the modern rule of the maritime law as administered in England with reference to the incidence of

(*a*) *Per* Lord Stowell (then Sir W. Scott), *The Woodrop Sims*, 2 Dods. 83, 85. In *The Lord Melville*, cited 2 Shaw's App. Cas. 395, is a dictum to the like effect.

loss in case of collision. It has been universally accepted as such, cited with approval in the House of Lords (*b*), and frequently acted upon by the Courts for the last seventy years. But it must here be pointed out, that in one important particular Lord Stowell's statement of the case in which the rule of division of loss is applicable is not in accordance with previous decisions of the Court of Admiralty; that the ancient rule of the Admiralty as to division of loss had for upwards of a century previous to the case of *The Woodrop Sims* a more extended operation than is attributed to it by Lord Stowell; and that if, at the present day, its operation is confined to the case of "both ships in fault," it is by reason of the *communis error*, and not by virtue of any express decision of the Courts (*c*).

History of the rule. The Laws of Oleron.

The earliest trace (*d*) of the rule as to division of loss appears in the Laws of Oleron, a code of maritime law attributed to the twelfth century (*e*), and introduced from Aquitaine into this country not later than the fourteenth century (*f*). This code contains a provision (Art. 15) that when a ship at anchor is damaged by a ship under way,

(*b*) In *Hay* v. *Le Neve* (1824), 2 Shaw's (Sc.) App. Cas. 395.

(*c*) The authorities for the statement in the text are a series of cases (unreported) from 1677 downwards, collected by the present writer from the Admiralty Court books. They are set out in the note "History of the rule as to division of loss in English law" at the foot of this chapter; and at greater length in Marsden's Admiralty Cases (Clowes & Sons, London).

(*d*) The Book of Exodus, Ch. xxi., vv. 35, 36, is cited by Cleirac in support of the rule. The passage is as follows: "And if one man's ox hurt another's, that he die; then they shall sell the live ox, and divide the money of it; and the dead ox also they shall divide. Or if it be known that the ox hath used to push in time past, and his owner hath not kept him in; he shall surely pay ox for ox; and the dead shall be his own."

(*e*) 1 Pardessus, Collection des Lois Maritimes, pp. 283 *seq.*

(*f*) The Record or Roll *De Superioritate Maris et Jure Admiralitatis Angliæ* of 12 Ed. 3 (1338), refers to La Ley Oleyroun as the law of the English Admiralty: see Prynne, Animadv. 109; Selden's Mare Clausum, l. 2, c. 24. A record in the Tower of London, set out by Prynne, Animadv. 117, shows that the Law of Oleron was administered in the local Court of Bristol in 24 Ed. 3 (1350). There are extant in the archives of the City of London and elsewhere in this country MSS. of these laws dating from the early part of the 14th century: Twiss' Black Book, vol. 1, lxxxii.

the loss on the ship shall be divided between the two ships, and the loss on the cargo between the merchants (*g*), provided the master and mariners of the ship under way swear that they did not do the damage wittingly (*h*). The rule is stated to be so framed in order to deter the owners of old and inferior ships from trying to make money by getting them sunk by collision and recovering damages from the other ship.

The laws of Wisby, a town in the island of Gotland (*i*), and various codes of maritime law in use subsequently to the thirteenth century in Flanders—all of them versions, more or less exact, of the Oleron code (*k*)—contain very similar provisions as to the incidence of loss where the collision is not wilful.

The instructions to the Admiral contained in the Black Book of the Admiralty, dating probably 1337—1351, contain a similar rule as to equal division of loss where the collision is accidental (*l*).

The instructions to the Admiral.

The language of some of the Northern Codes suggests that the division of loss was not necessarily in equal shares, but that there was a distribution of the loss on ships and cargoes in the nature of a general average contribution between shipowner and merchant (*m*). The exact meaning of the rule seems, however, always to have been doubtful, and to have given rise to dispute so early as the time of

The Northern Codes; equal or proportionate division of loss.

(*g*) . . . . "Le dommage doit estre apprisie et party par moitie entre les deux nefs, et les vins qui sont dedens les deux nefs doivent partir du dommage entre les marchaunts": 1 Twiss' Black Book, 108; *ib.* vol. 2, p. 229, 1449; *ib.* vol. 3, p. 21.

(*h*) De bon gre.

(*i*) Dat Gotlansche Water-Recht, Arts. 29, 30, 65; 4 Twiss' Black Book, 87, 125; *ib.* 284; 1 Pardess. 481, 501.

(*k*) Jus Maritimum Lubecense in usus Osterlingorum, Art. 23; 4 Twiss' Black Book, 373; 3 Pardess. 345 (Art. 21); *ib.* 361 (Art. 47); Twaterrecht in Vlaenderen, 4 Twiss' Black Book, 321, 435; Jugements de Damme, ou Lois de Westcapelle, 1 Pardess. 379.

(*l*) 1 Twiss' Black Book, 36; *ib.* xxx. Introd.

(*m*) See the Laws of Gotland (Wisby), 4 Twiss' Black Book, 284; 1 Pardess. 482; of Flanders, Codex Brugensis, *ib.* 321; of Damme, 1 Pardess. 379; of Flanders, Dantzic MSS., 4 Twiss' Black Book, 435.

Bynkershoek. He describes in graphic terms the astonishment of the Supreme Court of the Netherlands, of which he was a member, when he endeavoured to persuade his colleagues to enforce a proportionate, and not an equal, division of the loss (*n*). Valin states that in his day opinion was divided upon this point; his own being in favour of an equal rather than a proportionate division (*o*).

Consolato del Mare.

The Consolato del Mare, a code in use in the Mediterranean in the sixteenth century, contains some provisions as to the incidence of loss, the principle of which appears to be, that where the collision is caused by negligence, the wrong-doers shall make good the loss; and that where it is accidental, the loss shall be apportioned between the ships and cargoes by way of general average contribution, but in what shares does not appear (*p*).

Danish and Swedish Code.

By Danish Codes of 1561 and 1683 (*q*), and by Swedish Codes of the seventeenth century (*r*), the loss in the case of an accidental collision between two ships under way was equally divided.

L'Ordonnance de la Marine.

By the celebrated Ordonnance de la Marine of Louis XIV., which was promulgated in the latter part of the seventeenth century, the rule in the case of accidental collision was that the loss should be equally divided (*s*). Some doubt appears to have existed as to whether it should not be apportioned in the nature of an average contribution, but Valin states that the better opinion was in favour of equal division (*t*).

Division of loss according to decision of experts, by Danish Codes.

Danish Codes of 1508 and 1683 divide the loss of an accidental collision between the ships, according to the

(*n*) Memini, me senatore et de geometricâ proportione perorante, reliquos senatores obstupuisse atque si Jovis ignibus icti essent: Bynk. Quæst. Jur. Priv. l. iv. c. 20.

(*o*) Valin sur l'Ordonnance, l. 3, tit. 7, Art. 10, vol. 2, p. 178.

(*p*) Consolato del Mare, cc. 155–158; 2 Pardess. 174 *seq.*; 3 Twiss' Black Book, 283 *seq.*

(*q*) 3 Pardess. 260, 288.

(*r*) *Ibid.* 129, 173.

(*s*) Valin sur l'Ordonnance de la Marine, l. 3, tit. 7, Arts. 10, 11.

(*t*) *Ibid.* vol. 2, 178.

decision of experts, without specifying the principle on which the division is to be made (*u*).

Division in thirds.

A different division is adopted in the Danish Code of 1508 in case of collision between a ship under way and another at anchor (*x*). The ship under way accidentally damaging another at anchor pays one-third of the loss. And a similar rule appears in Swedish Codes of the seventeenth century (*y*). A like division of the loss is adopted in a code of maritime law stated to have been in force in the kingdom of Malacca in the thirteenth century, in the case of a collision in bad weather between two ships of a fleet sailing in company for protection against pirates (voyage de conserve). In another Eastern Code, contained in the collection of Pardessus, the proportion of damage recoverable in such a case by the injured ship is reversed —the injured ship being enabled to recover two-thirds, and having to bear only one-third of her loss (*z*).

Originally the rule applied only where the collision was accidental.

In all these codes the division of loss took place only where the collision was accidental. There is no suggestion for dividing it where the collision could have been avoided. On the contrary, it is expressly provided, or clearly implied, in some of the codes, that the wrong-doer in a collision shall make full recompense, and that he shall recover nothing (*a*).

Rule of English Admiralty

Nor is the modern rule of the English Admiralty, which divides the loss where both ships are in fault, a rule of the

(*u*) 3 Pardess. 261, 289.

(*x*) *Ib.* 237.

(*y*) *Ib.* 129, 173.

(*z*) See 6 Pardess. 409, 459. These codes are said to have been founded on customs in force in the East. They purport to have been promulgated by Mahmoud Schah, the Mahomedan conqueror of the Eastern islands. It seems probable that he brought them from the Mediterranean.

(*a*) This seems implied in Art. 15 of the Oleron Code, *supra*, p. 127. See also Laws of Wisbuy, Arts. 49, 65; 1 Pardess. 496, 501; of Damme, Art. 15; 1 Pardess. 379. And see the Consulate, c. 157 *seq.*; 2 Pardess. 174; Instructions to the Admiral, 1 Twiss' Black Book, 36, 37. The references given by Boulay Paty, Cours de Droit Comm. Mar. tit. 12, s. 6 (vol. 4, p. 493), in so far as they suggest that, by these codes, when the collision was accidental the loss rested where it fell, appear to be misleading.

dividing the loss where both ships in fault.

ancient maritime law. In two alone of the ancient codes is there a trace of dividing loss caused by fault (*b*).

The rule of the English law, therefore, differs materially from that of any of the above-mentioned codes. Whatever its origin may be, its scope and application for the last hundred years are clear. It applies where both ships are proved to be in fault, and in no other case. It differs, therefore, widely from the rule of the Oleron Code, which appears to be the foundation of all the other codes. The English rule applies only where there is fault in both ships; the ancient rule applied only where there was no fault in either ship. It differs also from the rule of the general maritime law—so far as there can be said to be any general maritime law on the subject. The maritime law divided the loss where the collision was inevitable, and also in the so-called case of inscrutable fault—that is to say, where the fault was not brought home to either ship (*c*). In this last case, by the law of England, as laid down by Lord Stowell, each ship bears her own loss. But cases have occurred during the present century in which had there been a chance of getting the loss divided on the ground that the collision occurred without fault in either ship or on the ground that the cause of collision was left in uncertainty, the *rusticum judicium* (*d*) would at least have been mentioned. But the books are entirely silent as to such an application of the rule. Where the plaintiff has failed to establish negligence against the adverse party, the practice has been to dismiss the action, and generally with costs.

(*b*) By the Wisbuy Stadalag (4 Twiss' Black Book, 391), a ship brought up in a fair way pays half the loss of another that goes foul of her. And in the Consolato del Mare, c. 157; 2 Pardess. 176, there is a somewhat similar provision, as between two ships at anchor.

(*c*) See Bell's Comm. (ed. 1870, by McLaren) I. 627; Valin sur l'Ordonnance, l. 3, tit. 7, Art. 11; 1 Parsons on Shipping (ed. 1869), 527; 4 Boulay Paty, Cours de Droit Comm. Mar. p. 496, citing Grotius, l. 2, c. 17, § 21; Loccentius de Jur. Mar. l. 4, c. 9, § 11.

(*d*) Cf. *The Maid of Auckland*, 6 Not. of Cas. 240; *The Catherine of Dorer*, 2 Hag. Ad. 145; *The Laconia*, 2 Moo. P. C. C. N. S. 161; *The Clara*, 12 Otto, 200; *infra*, pp. 154, 156.

Extension of the rule to cases of fault in both ships, and to the case of "inscrutable fault."

The extension of the rule to cases where fault is proved against both ships is easy of explanation. From the time of the Aquilian law the shipowner has been liable for a collision caused by the fault of his master and crew (*e*). It is not surprising that a rule framed to meet the difficulty of proving fault—*ob difficultatem culpæ probandæ* (*f*), —should have been applied to cases where fault contributing to the collision was proved against each ship, but where the difficulty of proving the exact amount of damage resulting from the fault of each ship remained (*g*). We find this difficulty of proof assigned as a reason for applying the rule in a case early in the last century (*h*). It is clear that in the time of Bynkershoek (*i*) and of Valin (*j*), the rule was applied to cases where fault in one or in both ships was manifest but not brought home to either. The *difficultas probationum*, which is at the root of the rule, clearly exists in the one case as much as in the other. How it happened that in England the rule ceased to be applicable in the only case to meet which it was originally instituted, is not so clear (*k*).

Policy of the rule.

As to the policy and justice of the rule there has been much difference of opinion. Cleirac (*l*) approves the rule upon the questionable ground above stated—that induce-

(*e*) See *supra*, p. 68, note (*l*).

(*f*) Grotius de Jure Belli et Pacis, l. 2, c. 17, § 21; Loccentius, l. 3, c. 9, § 11.

(*g*) For an unconscious application of the rule by a British jury, see *Raisin* v. *Mitchell*, 9 C. & P. 613, *supra*, p. 28.

(*h*) *Ashton* c. *Noden*, *The Mary* and *The Rebecca* (1706); *infra*, p. 147.

(*i*) See *supra*, p. 130.

(*j*) Par la difficulté de reconnoître de quel côté est la faute, et juger même si la faute est de nature à mériter que celui à qui elle est imputée supporte le dommage en entier, il arrive presque toujours que le dommage reçu de part et d'autre est jugé avarie commune: Valin sur l'Ordonnance, l. 3, tit. 7, Art. 11, 2 vol. 183.

(*k*) In America it has been doubted by writers of authority whether it is not applicable in cases of inscrutable fault: see 1 Parsons on Shipping (ed. 1869), 527; Story on Bailments, § 609; 3 Kent's Comm. 231; but see *The Clara*, 12 Otto, 200, where, in stating the law as to incidence of loss, the Court made no mention of the case of inscrutable fault.

(*l*) Us et Coustumes de la Mer (ed. 1661, Bordeaux, p. 68). He illustrates the rule by citing the Book of Exodus, ch. xxi., ver. 35.

ments must not be given to get ships wilfully run down (*m*). That he had not a high opinion of its justice seems probable from his stigmatizing it as *judicium rusticorum* (*n*), a term applied to it also by Chancellor Kent (*o*). In the courts of this country it has been much abused. Lord Denman, C.J., said of it: "It is an arbitrary provision of the law of nations, not dictated by natural justice, nor, possibly, quite consistent with it" (*p*). And more recently Lord Selborne, C., has spoken of it in similar terms (*q*). The arguments adduced in favour of it are as fanciful as they are divergent. The reason which suggested itself to Cleirac for its enactment was that, but for it, shipowners —*gens de mer ordinairement enclins au mal et à la baraterie* —would purposely get their ships run down on the chance of recovering excessive damages (*r*). This seems far-fetched. That the rule conduces to safety at sea, by encouraging shipmasters to take every possible precaution (*s*); or that it makes masters of large ships more careful of small ones (*t*), as has been suggested by other authorities, is at least doubtful. That it tends to avoid interminable litigation, as has been stated by a high authority in this country (*u*), is not evident. There can be

(*m*) "Est considérable que les gens de mer sont ordinairement enclins au mal et à la baraterie" —a low estimate of maritime morality, but one shared by judges of the Admiralty in recent times. See, *per* Dr. Lushington, *The Lady Campbell*, 2 Hag. A. & E. 5; and Sir R. Phillimore in *The Macleod*, 5 P. D. 254.

(*n*) "Les jurisconsultes nomment et qualifient cette décision par moitié *judicium rusticorum* . . . et se prattique ordinairement par les arbitres, arbitrateurs, et amiables compositeurs, lors et quand l'intérieur des parties, ou le motifs de la question n'est pas à descouvert et conneu; ou bien quand il y a de la coulpe de part et d'autre—*aut quando sunt diversæ judicum opiniones hinc et inde probabil.* Boer. dec. 42, n. 32—tel fut le jugement reconneu tant juridic du sage Roy Salomon, qu'il donna sur la question naturele entre deux mers" (*sic*).

(*o*) 3 Kent's Comm. § 231.

(*p*) *De Vaux* v. *Salvador*, 4 Ad. & El. 420.

(*q*) 7 App. Cas. 799.

(*r*) Cleirac, Us et Coustumes de la Mer, p. 68; Boulay Paty, tit. 12, s. 6.

(*s*) Celle-ci est fondée sur une raison d'intérêt public, à fin de rendre les maîtres des navires plus soigneux à prendre toutes les précautions possibles pour éviter cet abordage: Pothier, vol. 4, p. 444, Avaries, § 155.

(*t*) See Bell's Comm. (ed. 1870, by McLaren), i. 627.

(*u*) See *per* Lord Blackburn, 7 App. Cas. 819.

no doubt that in some cases it works positive injustice. It prevents the innocent owner of cargo on board either ship from recovering from the wrong-doing owner of either ship more than half his loss (*v*); and a leading case before the House of Lords (*x*) shows that it works in an arbitrary and uncertain manner when combined with the statutory limitation of liability (*x*).

Division of loss and limitation of liability.

The rule as to division of loss is probably connected with the law limiting shipowners' liability. Throughout the mediæval codes the object of the rule appears to have been to mitigate the disaster to an innocent sufferer by distributing the loss by collision between the two ships. The object of the statutory limitation of liability of modern days is avowedly the same.

Merchant Shipping Act, 1854.

By 17 & 18 Vict. c. 104, s. 298, where both ships infringed the statutory steering rule, the Admiralty rule as to division of loss was in effect repealed. Where one of the ships, A., infringed the statutory rule, and the other, B., was in fault in some other respect (*e. g.*, look-out), A. could recover nothing, while B. recovered half his loss. If both ships were in fault cargo owners could recover half their loss in all cases. This unsatisfactory state of the law was put an end to by 25 & 26 Vict. c. 63 (*y*).

Judicature Act.

Before the passing of the Judicature Act the rule as to division of loss had no application except in the Court of Admiralty. Elsewhere the rule that a person cannot recover damages for loss caused wholly or in part by his own negligence was applied in collision as in all other cases. The Judicature Act (36 & 37 Vict. c. 66), s. 25, sub-s. 9, enacts as follows:—

> In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to

(*v*) See *per* Lord Blackburn, *ib.*; *The Milan*, Lush. 388; but see *The Bernina*, 12 P. D. 58; 13 App. Cas. 1.

(*x*) *The Voorwaarts* and *The Khedive*, *infra*, p. 140.

(*y*) See further as to this, *supra*, p. 40.

have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of common law, shall prevail (*z*).

The law, therefore, as to the incidence of loss where both ships are in fault, is now the same in all the Courts (*a*).

Colonial law.

The rule of equal division of loss prevails in some, but not in all, the colonies and dependencies of Great Britain. In Canada, by a recent statute (*b*) it applies in the common law, as well as Admiralty, Courts. In Santa Lucia it applies where the cause of collision is unknown, where both ships are in fault, and also in the case of inscrutable fault (*c*).

It applies to all collisions, whatever the nationality of the ships, and wherever the collision occurs.

The rule of division of loss applies to all collisions, whatever the nationality of the ships, and wherever the collision occurs. Thus it has been applied where both the ships were British (*d*); both foreign (*e*); one British and one foreign (*f*); where the collision was in British waters (*d*);

(*z*) The marginal note to this section is "Damages by collision at sea." The words "at sea" do not restrict the operation of the Act. *Sutton* v. *Sutton*, 22 Ch. D. 511.

(*a*) At the passing of the Judicature Acts the Admiralty rule narrowly escaped abolition. In the original draft of the Act it was provided that the common law rule should prevail; but in the passage of the bill through the House of Commons the Admiralty rule was reinstated, and ultimately made the law of the land. The reasons for preferring the Admiralty to the common law rule are not apparent. It appears to have been thought that the former was more in accord with the law of foreign countries. See Hansard's Parl. Debates, 3rd ser. vol. 216, pp. 1800, 1801. A short summary of foreign laws upon the point is appended to this chapter. It will be seen that they are widely divergent.

(*b*) 43 Vict. c. 29, s. 8 (Canada).

(*c*) Civil Code of St. Lucia (1876), Art. 2360. "If the cause of collision be unknown, or it be impossible to determine by whose fault it was caused, or if both ships are in fault, the damages are borne in equal portions by both ships."

(*d*) *The R. L. Alston*, 8 P. D. 5; *The Margaret*, 9 P. D. 47; *The Vera Cruz*, 9 P. D. 88, 96.

(*e*) *The North American* and *The Teela Carmen*, Swab. 358; Lush. 79; *Chartered Mercantile Bank of India, &c.* v. *Netherlands India Steam Navigation Co.*, 10 Q. B. D. 521; *The Washington*, 5 Jur. 1067; *The Monarch*, 1 W. Rob. 21.

(*f*) *The Voorwaarts* and *The Khedive*, 7 App. Cas. 795; *Chapman* v. *Royal Netherlands, &c. Co.*, 4 P. D. 157; *The Rona* and *The Ava*, 2 Asp. Mar. Law Cas. 182; *The Vera Cruz*, 9 P. D. 88; *The Seringapatam*, 3 W. Rob. 38.

in foreign waters (*g*); and on the high seas (*h*). And, as stated above, it applies whether the action is in Admiralty or in a Court not having Admiralty jurisdiction (*i*). Whether the rule is *lex loci* or *lex fori* does not appear to have been decided. No question has been raised in any case as to its universal application. In the Court of Admiralty it was administered as part of the law maritime; though, as appears above, it is doubtful whether it ever formed part of any general system of maritime law.

The loss is apportioned in equal shares, whatever the degree of fault in each ship.

As has been already stated the law apportions the loss where both ships are in fault by obliging each wrong-doer to pay half the loss of the other. Thus, if the loss on ship A. is 1,000*l.* and that on B. is 2,000*l.*, A. can recover 500*l.* against B., and B. can recover 1,000*l.* against A. The Courts make no attempt to administer distributive justice by apportioning the loss according to the degree of fault of which each ship is guilty (*k*). "Until the case of *Hay* v. *Le Neve* . . . there was a question in the Admiralty Court whether you were not to apportion it (the loss) according to the degree in which they (the two ships) were to blame. But now it is, I think, quite settled, and there is no dispute about it, that the rule of the Admiralty is, that if there is blame causing the accident on both sides

(*g*) *Hay* v. *Le Neve*, 2 Shaw's (Sc.) App. Cas. 395.

(*h*) *The Rona* and *The Ava*, 2 Asp. Mar. Law Cas. 182. In *The Monarch*, 1 W. Rob. 21, the collision was "at sea;" in *The Washington*, 5 Jur. 1067, off Berry Head; in *The Seringapatam*, 3 W. Rob. 38, off Beachy Head.

(*i*) It was recently held by the Queen's Bench Division to be applicable in the case of a collision between Singapore and Sourabaya between two ships belonging to the same owners, British subjects, but registered under a foreign flag: *Chartered Mercantile Bank of India, &c.* v. *Netherlands India Steam Navigation Co.*, 10 Q. B. D. 521.

(*k*) *Trew* v. *Peiroe*, *The Mary of Poole* and *The Mary of Weymouth*, Ad. Ct. 7th July, 1692, *infra*, p. 146; *The Petersfield* and *The Judith Randolph* (1789), cited in the next case; *Hay* v. *Le Neve*, 2 Shaw's (Sc.) App. Cas. 395, and see the cases mentioned below, pp. 145, *seq.*; *per* Lord Blackburn, *The Khedive* and *The Voorwaarts*, 7 App. Cas. 795, 808; *The Margaret*, 9 P. D. 47, 51; *The Meteor*, Ir. Rep. 9 Eq. 567. The dictum of Lord Campbell in *The Friends*, 4 Moo. P. C. C. 314, 322, to the effect that the loss may be apportioned according to the degree of fault in each ship, is without authority.

they are to divide the loss equally, just as the rule of law is, that if there is blame causing the accident on both sides, however small that blame may be on one side, the loss lies where it falls" (*l*).

Principle of the rule. Circumstances that bring it into operation.

The principle of the rule is said to be equality of participation in a loss arising from a common fault (*m*). To bring the rule into operation, both ships must be guilty of negligence contributing to the loss (*n*). But the common fault, or rather the acts of negligence committed by the ships respectively, need not, it seems, be both faults contributing to the collision. Thus a schooner at anchor, whose sole fault consisted in having her anchor suspended from her hawse in a position likely to do damage if a collision occurred, was held liable for half the loss suffered by the other vessel, a dumb barge, that negligently went foul of the schooner, and was pierced and sunk by the schooner's anchor (*o*). The rule has also been applied in the case of a collision between a ship being launched and another under way, where the fault in the former was committed by the people ashore in starting her on the ways at an improper moment (*p*).

Does the rule apply except where the two ships are in collision?

Whether the rule applies where the two ships are both in fault for the collision, but the collision is not between themselves, is not clear. Whether, for example, in the case of a collision between ships A. and B. by the fault of one or both of them, and of a third ship, C., A. or B. could

(*l*) *Per* Lord Blackburn, *Cayzer* v. *Carron Co.*, 9 App. Cas. 873, 881.

(*m*) See *per* Lord Stowell in *The Woodrop Sims*, *supra*, p. 125; *per* Lord Selborne, C., in *The Voorwaarts* and *The Khedive*, 7 App. Cas. 795, 801; see also *The Lima*, 4 Jur. N. S. 147; *The Aurora*, Lush. 327; *The Seringapatam*, 5 Not. of Cas. 66; *The Celt*, 3 Hag. 328; and *per* Lopes, L. J., *The Bernina*, 12 P. D. 58, 96. See, however, *Trew* c. *Peirce*, *infra*, p. 146, where a different reason is given for the rule, namely, the difficulty of determining what part of the loss on each ship was caused by the fault of the other. In some foreign countries the loss is divided according to the degree of fault in each ship; see below, p. 159.

(*n*) *The Franklund*, L. R., 4 P. C. 529, 533; *The Rona* and *The Ava*, 2 Asp. Mar. Law Cas. 182; *Cayzer* v. *Carron Co.*, *The Margaret*, 9 App. Cas. 873.

(*o*) *The Margaret*, 6 P. D. 76; cp. *The Scotia*, 63 L. T. N. S. 324.

(*p*) *The United States*, 12 L. T. N. S. 33.

recover half her loss from C., has not been decided (*q*). In America the rule was applied where the collision occurred between a ship at anchor and another in tow by the fault of the tug and the ship at anchor (*r*).

In *The Digby Grand* (*s*), a tug, A., towing a vessel, B., was struck and injured by the tow-rope of another tug, C., which, being ahead of A., was also towing B. It was held that the damage was caused by negligence of tug C. in having too long a scope of tow-line out, and also by the negligence of tug A. in not keeping clear of the tow-line. The rule of equal division of damages appears to have been applied; but no question upon this point was raised.

In a Canadian case (*t*) the rule was applied where the damage was by an anchor without collision.

In *The Celt* an attempt was made to apply the rule where the fault of one ship was in no way a cause of the collision, and consisted in not standing by to assist the other. It is needless to add, the attempt was unsuccessful (*u*).

The rule has been extended in America to cases where two ships, as a tug and her tow, are both in fault for a collision with a third, which is free from fault. The judgment in such a case goes, not against each ship for the whole of the damages, but against each ship for half the damages, with a remedy over against each ship in case the other fails to pay the amount in which she is condemned (*x*).

Application of the rule where liability is limited.

The application of the rule produces singular results where one or both ships limit their liability under the Merchant Shipping Acts. The subject has been very fully discussed in the Admiralty and Appeal Courts

(*q*) As in *The Energy*, L. R. 3 A. & E. 48; and see *The Avon* and *The Thomas Joliffe*, *infra*, p. 144.

(*r*) *The James Gray* and *The John Fraser*, 21 How. 184.

(*s*) Ad. Ct. 30th Ap. 1884.

(*t*) *The McCallum* v. *The Odette*, 7 Duval (Canada), 36.

(*u*) 3 Hag. 321.

(*x*) *The Sterling* and *The Equator*, 16 Otto, 647; following *The Alabama* and *The Gamecock*, 2 Otto, 695.

and by the House of Lords. The case which finally settles the law on the subject is *Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Company*, *The Voorwaarts* and *The Khedive* (*y*).

The Voorwaarts and *The Khedive.*

Two ships, *The Voorwaarts* and *The Khedive*, having been in collision, the owners of *The Voorwaarts* brought an action *in rem* in the Admiralty Division against the owners of *The Khedive*, who counter-claimed for the amount of the loss suffered by their own ship (*z*). Both ships were held in fault for the collision. The owners of *The Khedive* brought an action in the Admiralty Division to limit their liability, and paid the amount of their statutory liability into Court. The damage to *The Voorwaarts* was greater than that to *The Khedive*, and the fund in Court was not sufficient to satisfy all the claims for which the owners of *The Khedive* were answerable. It was held by the House of Lords (Lords Selborne and Blackburn, Lord Bramwell doubting), overruling a previous decision of the Court of Appeal (*a*), that the owners of *The Voorwaarts* were entitled to prove against the fund in Court for a moiety of their loss, less a moiety of the loss of *The Khedive*, and to be paid out of the fund in respect of the balance *pari passu* with the other claimants. By the decision of the Court of Appeal above referred to (*a*), it had been held that the ship proving against the fund in Court was entitled to prove for half her loss, without deducting anything in respect of her liability to the other ship.

The question to be decided was whether in such cases there are two liabilities in damages, one on the part of each shipowner to the other shipowner for half the loss of the latter, or only one liability, namely, a liability on the

(*y*) 7 App. Cas. 795.

(*z*) *Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Co.*, 7 App. Cas. 795.

(*a*) *Chapman* v. *Royal Netherlands Steam Navigation Co.*, 4 P. D. 157. A decision of Baggallay and Cotton, L.JJ. (Brett, L. J., dissenting), reversing the decision of Jessel, M. R., in the Court below.

part of the owner of the ship that had done the greater damage, for the difference between half the loss of the one ship and half the loss of the other—in the words of Lord Selborne, "a moiety of the excess of the aggregate loss beyond the point of equality." It was held that the terms in which the rule of the Admiralty was laid down in *The Woodrop Sims*, *The Lord Melville*, *The Petersfield* and *The Judith Randolph*, and *Hay* v. *Le Neve*, showed that in substance there was but one action and one final judgment; and that such final judgment was for the balance between a moiety of the loss of the one and a moiety of the loss of the other. The later cases of *The Washington* and *The Catherine* (*b*), *The Seringapatam* (*c*), and *The Tecla Carmen* (*d*), were cited as confirming this view (*e*).

Lord Blackburn, in the course of an elaborate discussion of the law relating to the subject, lays stress upon the provisions of 53 Geo. 3, c. 159, and 17 & 18 Vict. c. 104, s. 514, as to the distribution by the Chancery Courts of the sum representing the amount of the statutory liability. The statute requires the Court "generally to do what may appear to be just" in the suit. Lord Selborne thought that there was little, if any, room for the argument from abstract justice and equity, the rule as to the division of loss being itself arbitrary; and Lord Bramwell (in an opinion which was written by him, but not delivered; see 7 App. Cas., note, pp. 826, 827) points out that some of the results following from the decision of the House of Lords are of doubtful equity or justice. It is further pointed out by Lord Bramwell (p. 827, note), that, by the decision of the House of Lords, the owners of *The*

(*b*) 5 Jur. 1067.
(*c*) 3 W. Rob. 38, 44.
(*d*) Lush. 79.
(*e*) To these cases may be added *Rennen* c. *Humble*, *The Hopewell* and *The Prosperous*, Ad. Ct. 9th May, 1698, where the sentence was in terms for the balance of loss; see *infra*, p. 146. In Holland the same decision was arrived at in a case mentioned in Bynkershoek, Quæst. Jur. Priv. l. 4, c. 21. See also *The Sapphire*, 18 Wall. 51; *The Manitoba*, 15 Davis, U. S. 97.

The Voorwaarts and *The Khedive.*

Voorwaarts were as well off as if their ship were blameless (*f*); and that the loss to the owners of *The Khedive* was the same as if their ship were alone in fault. Thus, where both ships are in fault, and one limits her liability under 25 & 26 Vict. c. 63, s. 54, her owners, inasmuch as they lose the right to recover damages against the other ship, are indirectly answerable in damages to a greater amount than the statutory limit.

The effect of this decision will be best seen by an illustration. Let the loss on ship A. be 10,000*l.*, the loss on ship B. 20,000*l.*, the loss on cargo on board B. 40,000*l.*, and the statutory liability of A. 24,000*l.* According to the (overruled) decision of the Court of Appeal the owners of B. would ultimately, and after payment of the amount of their liability to A., recover 3,000*l.*; that is to say, a proportionate part (one-third, or 8,000*l.*) of the 24,000*l.*, less 5,000*l.*, half the loss of A. (*g*). According to the decision of the House of Lords the owners of B. recover 4,000*l.*; that is to say, four-fifths of half the difference between the loss on B. and the loss on A. (*h*). Again, in the one case the collision would cost the owners of A., in loss to their own ship and damages payable to the other ship, 29,000*l.* (*i*); that is to say, the amount of their statutory liability in addition to half the loss on their own ship; in the other, 34,000*l.* (*k*), that is to say, the amount of their statutory liability in addition to the whole of the loss on their own ship. Again, in the one case the owners of cargo on board B. would recover 16,000*l.* (*l*); in the other 20,000*l.* (*m*). Lastly, the other circumstances being the same, if A. were not damaged at all, according to the decision of the House of Lords, the owners of cargo on

(*f*) 7 App. Cas. p. 827, note; and by Baggallay, L. J., 4 P. D. 170.

(*g*) £8,000 – £5,000=£3,000.

(*h*) ⅘ of ½ (£20,000 – £10,000)= £4,000. Half the whole loss on B. and her cargo being £30,000, and only £24,000 being recoverable, each claim must abate by one-fifth.

(*i*) £24,000 + £5,000 = £29,000.

(*k*) £24,000 + £10,000=£34,000.

(*l*) £24,000 – £8,000.

(*m*) £24,000 – £4,000.

board B. would recover 16,000*l.* (*n*); whereas if A. be damaged to the extent of 10,000*l.*, we have seen that they recover 20,000*l.* (*o*). According to the decision of the Court of Appeal cargo-owners would recover the same sum whether A. were damaged or not. Another result of the decision of the House of Lords is that, where the loss on each ship is the same, and each ship limits her liability, the whole of the sum paid into Court is divisible between the owners of cargo on board the two ships, whilst the shipowners get nothing. According to the decision of the Court of Appeal, the sum is divided rateably between shipowners and cargo-owners. On the whole, therefore, the decision of the House of Lords strongly favours cargo-owners at the expense of the shipowners.

Right of insured under running down clause.

It follows from the above decision that where both ships are to blame there arise, not cross liabilities, but a single liability for a balance upon the owners of the ship that has sustained the smaller damage; and therefore the shipowners to whom the balance is payable are not entitled, whether on behalf of themselves or of their underwriters on ship, to recover against underwriters who have agreed to indemnify them against "loss or damage to any other vessel," they being under no liability in respect of such loss or damage (*p*).

Division of loss where one ship is in charge of a compulsory pilot.

Where two ships, A. and B., are both in fault for a collision, and the fault of B. is entirely that of the compulsory pilot (*q*) in charge of her, the owners of B. will recover half their loss against A., whilst the owners of A. can recover nothing. Her owners are not liable at law, and no damage lien attaches to the ship. But the fault of the pilot affects the owners of B., and the owners of cargo on board her, to this extent: it brings into operation the rule as to division of loss, and prevents them from

(*n*) £24,000 – £8,000.
(*o*) £24,000 – £4,000.
(*p*) *The London Steamship Assurance Association* v. *The Grampian Steamship Co.*, 24 Q. B. D. 32; on appeal, *ibid.* 663.
(*q*) See below, p. 227, as to compulsory pilotage.

recovering more than half their loss (*r*). Moreover, though successful upon their defence of "compulsory pilot," they will obtain no costs (*s*). In the case last mentioned the owners of the ship in charge of the compulsory pilot are entitled to judgment for half their loss, without deducting anything on account of the loss of the other ship. The principle of the decision in *The Khedive* (*t*) does not apply in such a case.

The Hector. The case of *The Hector* (*u*), in which these points were decided, was as follows:—A collision occurred between *The Augustus* and *The Hector*, caused by the fault of the crew of *The Augustus* and the fault of the compulsory pilot of *The Hector*. The rule as to division of loss was applied. The loss of *The Augustus* was 3,000*l.*; that of *The Hector* 8,000*l.* It was contended that the owners of *The Hector* could recover only 2,500*l.* (*i.e.*, half her loss, namely, 4,000*l.* less 1,500*l.*, half the loss of *The Augustus*); that this resulted from the decision in the case of *The Khedive* (*v*), considered with reference to 17 & 18 Vict. c. 104, s. 388. The Court of Appeal declined to apply the principle of the decision in *The Khedive*, a case where the owners of both ships were liable, to the case before them, in which the owners of one ship were not liable at all (*x*).

An agreement between the shipowners that both ships, A. and B., were in fault, does not prevent the owner of cargo on board B., in an action by the owner of A. to

(*r*) *The Hector*, 8 P. D. 218; *The Demetrius*, L. R. 3 A. & E. 523. The owners of cargo on board B. are in the same case: *The Milan*, Lush. 388; but see *The Bernina*, 12 P. D. 36, 58.

(*s*) *The Rigborgs Minde*, 8 P. D. 132.

(*t*) 7 App. Cas. 795.

(*u*) 8 P. D. 218.

(*v*) *Stoomvaart Maatschappy Nederland* v. *P. & O. Steam Navigation Co.*, 7 App. Cas. 795.

(*x*) The dictum of Brett, L. J., in *Chapman* v. *Royal Netherlands Steam Navigation Co.*, 4 P. D. 157, 184, to the effect that the phrase "answerable in damages" in sect. 54 of 25 & 26 Vict. c. 63, is applicable to the last stage of the litigation between the ships, that is, to half the difference between the losses on the two ships respectively, cannot, after this decision, be supported.

limit his liability, from asserting that A. was alone in fault; and he is entitled to an issue upon that question (*y*).

Collision between ships of the same owner; rights of owners of cargo.

The rule as to division of loss where both ships are in fault was recently held by the Court of Appeal to apply where a cargo owner was suing the shipowner for loss incurred in a collision between the carrying ship and another ship belonging to the same owners, caused by the fault of both ships (*z*). The shipowner was protected from liability for the negligence of those in charge of the carrying ship by the terms of the bill of lading. It was held that he was nevertheless liable in tort (*a*) for the negligence of those on board the other ship; but his liability was for half only of the loss; in respect of the other half of the loss, it was held that he was relieved by the bill of lading.

The rule gives and also takes away or abridges a remedy.

It follows from the above considerations that the rule as to division of loss is not merely a restriction upon the common law doctrine of contributory negligence. It not only gives a remedy where by the common law there is none, but it also abridges a right which formerly existed at law, but now does not. When both ships were in fault the innocent owner of cargo on board either ship could formerly have recovered at law the whole of his loss against the owners of either ship. In Admiralty it was held that he could recover no more than half his loss against the owner of the other ship (*b*); and since the Judicature Acts the rule is now the same at law. In an action framed upon the contract of carriage, the rule as to division of loss has no application. In such an action the cargo owner can, subject to the terms of the bill of lading, recover full damages upon the contract of carriage (*c*).

Cargo owner can recover only half his loss in tort.

(*y*) *The Karo*, 13 P. D. 24.

(*z*) *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, 10 Q. B. D. 521.

(*a*) Cf. *Hayn* v. *Culliford*, 4 C. P. D. 182.

(*b*) *The Milan*, Lush. 388. So also in Canada: *The Eliza Keith* and *The Langshaw*, 3 Quebec L. R. 143. Qu., whether these cases are affected by *The Bernina*, 12 P. D. 58; 13 App. Cas. 1. See *per* Lord Esher, M. R., 12 P. D. 83.

(*c*) *The Bushire*, Ad. Div., 24th

The Hector (*ubi supra*) also shows that the innocent owner of a ship injured by fault on the part of her compulsory pilot, and also on the part of those on board the other ship, is, by the rule of division of loss, deprived of the right which, it seems (*d*), he formerly had, of recovering full damages against the owners of the other ship.

The rule applies where a ship is "deemed to be in fault."

The rule of division of loss applies where one of the ships is guilty of negligence in fact, and the other is "deemed to be" in fault for infringement of the Regulations (*e*). So it would apply where both ships were held in fault under the statute. It does not apply where two ships are to blame for a collision with a third; in such a case the decree is against both for the whole loss (*ee*).

Not in case of joint tort-feasors.

Nor under Lord Campbell's Act.

Nor does it apply to actions under Lord Campbell's Act, consequently the plaintiff in such an action will recover full damages. The High Court of Admiralty had no jurisdiction to entertain these actions, and the Judicature Act, 1873, s. 25, sub-sect. 9, did not apply the rule of division of loss to them (*f*).

Whether the rule applies where each ship is negligent, but one might with ordinary care have avoided the collision.

It has been doubted whether the doctrine of the well-known case *Davies* v. *Mann* applies at all in Admiralty; whether in the case of a collision between ships a ship guilty of negligence such as that of the donkey-owner in *Davies* v. *Mann* could recover more than half her loss. It was assumed in a case in Ireland (*g*) that in such a case

March, 1885; the dictum of Brett, M. R. (10 Q. B. D. 538), applies to actions in tort. As to the law in America on this point, see p. 286, *infra*.

(*d*) Qu., whether the fault of the pilot is contributory negligence affecting the shipowner? see *Spaight* v. *Tedcastle*, 6 App. Cas. 217, *infra*, p. 241; *The Energy*, L. R. 2 A. & E. 48; *Dudman* v. *Dublin, &c. Board*, Ir. Rep. 7 C. L. 518.

(*e*) *The Voorwaarts* and *The Khedive*, 7 App. Cas. 795; *Chartered Mercantile Bank of India, &c.* v. *Netherlands India Steam Navigation Co.*, 10 Q. B. D. 521; *The Hochung* and *The Lapwing*, 7 App. Cas. 512; *The Vera Cruz* (No. 1), 9 P. D. 88 (revd. on another point, 9 P. D. 96).

(*ee*) *The Avon* and *The Thomas Joliffe*, L. R. 1891, P. 7. ✝ see below

(*f*) *The Bernina* (No. 2), 11 P. D. 31; 12 P. D. 58; H. L. *nom. Mills* v. *Armstrong*, 13 App. Cas. 1. In *The Vera Cruz* (No. 1), 9 P. D. 88, Butt, J., applied the rule in such an action where the proceedings were *in rem*. This part of his judgment was rendered inoperative by the Court of Appeal holding that there was no jurisdiction *in rem* under Lord Campbell's Act (9 P. D. 96).

(*g*) *The Meteor*, Ir. Rep. 9 Eq. 567. In *The Vera Cruz* (No. 1), 9

(*ee*) *The Englishman* ✝ *Australia* 1894 P 239

Davies v. *Mann* has no application; and that where a vessel is negligent she will be liable for half the loss, though the other might with ordinary care have avoided the collision. But there seems no ground for making a distinction between law and Admiralty as to the legal consequence of a particular act of negligence. The loss will be divided only where each ship is guilty of negligence contributing to the collision (*h*).

Note I.

History of the Rule as to Division of Loss in English Law.

The history of the rule as to division of loss in the English Admiralty during the last two centuries (1677—1890) is as follows (*i*):—The earliest application of the rule during that period was in 1677. In that year Sir Richard Lloyd condemned the owner of the defendant ship in half the loss of the plaintiff ship and of repairs rendered necessary by the collision (*k*). No reason is assigned for dividing the loss. In 1692 the rule was applied by Sir Charles Hedges (*l*) as between two ships at anchor in Ramsgate Roads. The decree states that the collision was accidental (*casu fortuito*), and that therefore (*m*) the loss on the plaintiff ship and cargo (which was totally lost) was to be deemed to have been caused by the

P. D. 88, Butt, J., appears to have been of opinion that, but for the Admiralty rule, the plaintiff could have recovered nothing. See further, on this subject, *supra*, p. 18.

(*h*) *The Rona* and *The Ava*, 2 Asp. M. L. C. 182; *The Frankland* and *The Kestrel*, L. R. 4 P. C. 529.

(*i*) The following cases, all of which, prior to *Hay* v. *Le Neve* (1824), are unreported, are taken from the record books of the High Court of Admiralty and of the Court of Delegates, the Court of appeal from the Admiralty. The series of records from about 1660 downwards is very complete. For a further statement of the cases, see Marsden's Admiralty Cases (Clowes & Sons, London), references to which will be found in Table of Cases, *ante*.

(*k*) *Harper* contra *Gravenor*, *The Lamb* and *The Adventure*, 6th July, 1677; affirmed by the Delegates, 7th May, 1678; see also the order made by the Admiralty Court, 11th Dec. 1679.

(*l*) Sitting for the judge of the Admiralty. So in the last case, Sir R. Lloyd sat for Sir L. Jenkins. At this date, and for many years after, surrogates were appointed by the judge to sit in his place.

(*m*) "*Ex quo, quod sibi constat, dicto navi collisionem ex Peirce* (master of *The Mary of Weymouth*, the defendant ship), *et nautarum suorum culpâ et negligentiâ quadamtenus pervenisse.*"

fault of the master and crew of the defendant ship (*n*). In 1695 the rule was again twice applied by Sir C. Hedges. In one case (*o*) no reason is assigned; in the other (*p*) it was expressly found that the loss of the plaintiffs (*The Little Betty* owners) was caused by the fault of the master and crew of *The Jonas*, the ship sued; therefore (the decree continues), *The Jonas* owners are justly liable to make good to *The Little Betty* owners a certain part of their loss; but since, by reason of the difficulties of proof, it was impossible to determine the amount of damage caused to each ship by the other, the judge, following the universal rule of the maritime law, condemned *The Jonas* owners in half the loss of *The Little Betty* owners. It will be observed that in this case no decree was made against *The Little Betty* owners; nor was it found, in terms, that their ship was in fault (*q*).

The John and *The Mary Rose; The Little Betty* and *The Jonas* (1695).

The rule was next applied in 1698 by Sir C. Hedges in a case where each ship suffered injury, and each claimed damages against the other. The interlocutory decree was to the effect that the damage done to each ship ought to be borne by both ships, share and share alike; viz., half of the damage suffered by *The Hopewell* to be paid by the owners

The Hopewell and *The Prosperous* (1698).

(*n*) *Trew* c. *Peirce*, *The Mary of Poole* and *The Mary of Weymouth*, 7th July, 1792. This case was appealed, but the appeal seems to have come to a premature conclusion. The last entry in the Assignation Book, dated 5th Nov. 1693, is as follows: *Domini ad petitionem Miller* (the appellant's proctor) *decreverunt partes appellatos attachiandos fore.* The vessel sunk was a small vessel and of no great value.

(*o*) *Fantley* c. *King*, *The John* and *The Mary Rose*, 4th Feb. 1695.

(*p*) *Beckham* c. *Chapman*, *The Little Betty* and *The Jonas*, 20th Jan. 1695.

(*q*) The judgment in this case was by way of interlocutory decree; no sentence was porrected or read. The following is an extract from the Act on the file. The decree states that *The Little Betty* and her cargo were sunk and lost—"ex præfati Jacobi Chapman magistri navis *The Jonas of Whitby* et nautarum suorum culpâ et negligentiâ, dictamque submersionem eisdem merito imputari de jure debere; ideoque præfatos Henricum Lindskill et socios, proprietarios ejusdem navis *The Jonas of Whitby*, ad certam damni partem luendum et exsolvendum condemnandos fore de jure debere (Judex) pronunciavit. Cum autem, ob incertitudinem ex varietate et contrarietate depositionum testium hincinde examinatorum proveniente, certa pars damni, quota est quam altera pars alteri dedit, liquidari haud possit, Dominus Judex antedictus, dispositionem juris maritimi apud omnes receptissimi sequens, præfatum Henricum Lindskill et socios . . . unam medietatem damni in hâc parte sustenti Jacobo Beckham et sociis . . . solvere debere pronunciavit." And the decree, after reciting that the whole of the loss on *The Betty* and her cargo was 453*l.* 16*s.*, condemned the defendants in one-half—viz. 226*l.* 18*s.*

of *The Prosperous*, and half of the loss of *The Prosperous* to be paid by the owners of *The Hopewell*. So much as is here quoted of the registrar's minute is in English; the words appear to have been taken down as they fell from the judge. No reason is given for the application of the rule (*r*). Upon a subsequent day (*s*) the judge found that the damage to *The Prosperous* amounted to 250*l.*, and that to *The Hopewell* to 60*l.*, and he condemned *The Hopewell* owners in the difference between the halves of these sums, namely 95*l.*

The Jeremiah and *The Providence* (1702).

The next application of the rule was in 1702 by Dr. Bramston, sitting as surrogate for Sir C. Hedges (*t*). The interlocutory decree finds the collision to have been caused by the fault of the master and crew of the defendant ship, *The Providence*, and the rule of division of loss is stated to have been applied upon the same grounds as in *Beckham* c. *Chapman* (*The Little Betty* and *The Jonas*, *supra*).

The Adventure and *The Supply* (1706).

Again, on the 14th of June, 1706, the rule was applied by Dr. Bramston in *The Adventure* and *The Supply* (*u*); and on the 23rd of October, 1706, in *The Blessing* and *The William and John* (*x*). The decrees in both these cases are in almost exactly the same terms as in *The Jeremiah* and *The Providence*, and the reasons stated for the application of the rule are the same. In these last three cases the plaintiff ship was sunk with her cargo and totally lost; the defendant does not appear to have suffered any loss, or, at least, to have made any claim except to be dismissed with his costs. It will be observed that the finding upon which the decree proceeds is that the plaintiff's loss was caused by the fault of the defendant ship; there is no finding that the plaintiff ship was in fault.

The Mary and *The Rebecca* (1706).

Up to this time the rule does not appear to have been applied or recognised by the Judges Delegates, the Court of appeal from the High Court of Admiralty, a tribunal

(*r*) *Rennen* c. *Humble*, *The Hopewell* and *The Prosperous*, 9th May, 1698. The Act on the file is to the same effect: see Act Book, p. 85.

(*s*) 26th May, 1698.

(*t*) *Mason* c. *Johnson*, *The Jeremiah* and *The Providence*, 11th March, 1702: see Assignation Book, No. (in Record Office) 362; Act Book, fol. 407, A.

(*u*) *Nom. Marsingill* c. *Taylor*; Assignation Book, vol. 368; Act Book, fol. 533.

(*x*) *Kichener* c. *Cocklin*, Ad. Act Book, fol. 4.

consisting of two or more of the common law judges and civilians. In the same year (1706) in which *Marsingill* c. *Taylor* was decided Dr. Bramston applied the rule in *The Mary* and *The Rebecca*, *Noden* c. *Ashton* (*y*). In this case it was expressly found that both ships were in fault; but the sentence states that, on account of the impossibility of determining upon conflicting evidence what proportion of the damage suffered by the plaintiff ship was properly attributable to the fault of the other, the *rusticum judicium* was applied, and the defendant was condemned in half of the plaintiff's loss (*z*). This sentence was affirmed on appeal by the Delegates (*a*).

The North Lyon and *The Phœnix* (1712).

In 1712, the Delegates varied a decree of Sir C. Hedges, by which he had dismissed the defendants, the owners of *The Phœnix*, without costs (*b*). The Delegates declared "that half of the damages sustained by *The North Lyon* in the ship and goods, amounting to the sum of 3,154*l.* 18*s.* 5½*d.*, ought to be paid by Western and others, parties appellate in this cause, and did condemn them accordingly in the said sum, and in the further sum of 200*l.* for costs of sute" (*c*). Upon a subsequent day, at the petition of the owners of eleven-sixteenths of *The Phœnix*, the Delegates decreed a monition against the owners of the other five-sixteenths of *The Phœnix* for their proportion of the damages and costs, the owners of the eleven-sixteenths undertaking to pay their proportion of such damages and costs.

The Thomas and Jane and

The next reference to the *rusticum judicium* is in the year

(*y*) 20th June, 1706.

(*z*) The following passage is extracted from the sentence: "Nos Surrogatus antedictus eundem Johannem Ashton ad certam damni prædicti partem luendum et exsolvendum condemnamus et decernimus. Cum autem ob incertitudinem ex varietate et contrarietate depositionum testium hincinde examinatorum provenientem certa pars damni quota sit quam altera pars alteri dedit liquidari et adamussim (*i. e.*, exactly, by rule; amussis, a workman's rule) taxari haudquaquam possit, Nos, dispositionem Juris Maritimi apud omnes gentes in hâc parte receptissimi sequentes, dictum Johannem Ashton magistrum dictæ navis *The Rebecca* in unâ medietate damni prædicti condemnandum fore de jure debere pronunciamus, decerninus, et declaramus, sicque condemnamus, &c."

(*a*) Ward, B., Smith, B., Dormer, J., and Drs. Oldys, Tindall, Pagit, and Herriott, were the judges.

(*b*) *Gull* c. *Carswell*, *The North Lyon* and *The Phœnix*, 26th May, 1709.

(*c*) *Gull* c. *Carswell*, 19th Dec. 1712.

1726, in *The Thomas and Jane* and *The Isabella*. In that case Sir Henry Penrice, Judge of the Admiralty Court, found that the plaintiff had failed in the proof of his libel (*defecisse in probationibus*), and dismissed the defendant without costs (*d*). The question of dividing the loss appears, however, to have been agitated; for in the registrar's minute book, before the note of the decree, is an entry to the effect that the judge assigned the cause to a future day, to be heard upon argument of the question, "Whether the *rusticum judicium* can be admitted in this case?" These words are struck out, and the words follow stating the effect of the decree as above mentioned. *The Isabella* (1726).

After twenty years (1746), the rule again appears in a case decided by Sir Henry Penrice (*e*). At this date the proceedings in the Court of Admiralty were carried on in English. The judge pronounced "that the loss of the said ship (*The Eagle*) and cargo, from the great contrariety of the evidence, was so uncertain, that he did adjudge and decree the damage sustained by the loss of the said ship and cargo to be equally payd and borne by (plaintiffs and defendants), and therefore condemned Farrer's clients (defendants) in a moiety of such damage." *The Eagle* and *The Hopewell* (1746).

Up to this point, therefore, we find the application of the rule to have been as follows:—In 1677 no reason is assigned for its application. In 1678 it is applied where the collision was in fact without fault in either ship (*casu fortuito*), but fault was presumed against the defendant ship. In 1695 it is twice applied; in one case no reason is assigned, in the other there is an express finding that the collision was caused by the fault of the defendant ship (*qy.*, alone?), and the rule is applied because it is impossible to say how much damage was done by the one ship to the other. Hitherto there had been no cross claim by the defendant, and, except in the first case, the plaintiff ship and cargo had been totally lost. In 1698 a case occurs in which both ships are injured and each claims damages against the other. The rule is applied for the same Summary of cases previous to 1789.

(*d*) *Reed* c. *Wellford*, *The Thomas and Jane* and *The Isabella*, 20th Jan. 1726.

(*e*) *Noble* c. *Wilson*, *The Eagle* and *The Hopewell*, 28th Nov. 1746.

reason as before, namely, because of the impossibility of apportioning the loss suffered by each ship by reason of the negligence of the other; but there is no finding that the plaintiff ship is in fault; on the contrary, it is found that the collision is caused by the fault of the defendant ship. In 1702, and twice in 1706, the rule is applied, for the same reasons as before, the finding being in each case that the collision was caused by the fault of the defendant ship, and no claim for damages being raised by the defendant. In 1706, and again in 1709, the rule is applied by the Delegates, upon appeal from the Admiralty; in the one case the reasons stated are the same as before, in the other no reasons are given. In 1726 we find the Admiralty Court dismissing the defendant, because the plaintiff had failed in proof of his libel, *i. e.* in proving fault on the part of the defendant ship. Twenty years later (1746) the rule is applied because the cause of the plaintiff's loss is uncertain, no fault being found in either ship. For forty-three years after this we find no mention of the rule, though several collision cases appear in the record books, in some of which the plaintiff recovers full damages, in others the defendant is dismissed.

History of the rule since 1789.

The Eagle and *The Hopewell* is the last appearance of the *rusticum judicium* until 1789, the year in which the well-known case of *The Petersfield* and *The Judith Randolph* occurred. It is singular that in that year three cases were decided, in which the rule of division of loss was applied; in two of them by the High Court of Admiralty, in the other by the Delegates. It will be convenient to take them, as before, in order of date.

The Petersfield and *The Judith Randolph* (1789).

On the 20th of May, 1789, Sir James Marriott, Judge of the Admiralty Court, in *The Petersfield* and *The Judith Randolph* (*f*), pronounced "that both ships were in fault; that *The Judith Randolph* was most in fault; and decreed that the whole of the damage sustained by the owners of the ship *Petersfield* and her cargo, which was sunk and lost, as well as the 230*l.* damages and expenses given against the

(*f*) In the Assignation Book, *nom. Wildman* c. *Blakes.*

ship *Petersfield*, and the costs of suit here on both sides, be borne equally by the parties in this suit."

This appears to have been the first case in which the *rusticum judicium* was applied with an express decision that both ships were in fault; the only case in which, according to modern authorities, it is now applicable. It is worthy of note that so important a point of maritime law should apparently have been undecided so late as the year 1789; and that a decision extending the operation of the rule of dividing the loss should never have been challenged.

The Friends Goodwill and *The Peggy* (1789).

The next case in order of date is *The Friends Goodwill* and *The Peggy* (*g*). This was a decision of the Delegates varying a decree of Sir J. Marriott. In a previous year (9th December, 1785) that learned judge had pronounced that *The Peggy*, the defendant ship, was alone in fault, and condemned her owners in full damages and costs. The case was appealed, and on the 7th of July, 1789, the Delegates (*h*) "pronounced for the appeal made and interposed in this cause, and that the judge from whom the cause is appealed hath acted wrongfully, nully, and unjustly; reversed the decree of the said judge, and in the principal cause (already by them retained) did pronounce that the master and crew of each of the said ships *Friends Goodwill* and *Peggy* contained in the proceedings of this cause were equally blameable in their conduct as to the said two ships running foul of each other, and by which means the said ship *Friends Goodwill* and cargo were totally lost; that the loss or damage occasioned by the aforesaid accident, and all costs, charges, and expenses incurred or to be incurred on account thereof, ought to be borne, paid, and sustained by the said John Stoker and Robert Hutton, the owners of the said ships, in equal moietys, and share and share alike; and further pronounced (in presence of the said report) (*i*), that the value of the said ship *Friends Goodwill*, at the time she was sunk as aforesaid, was nine hundred pounds, and the cargo of the value of one hundred pounds and five

(*g*) *Nom. Hutton* c. *Stoker*.

(*h*) Gould, J., Ashurst, J., Hotham, B., and Dr. Fisher, were the judges.

(*i*) The parties had agreed that the Court should take the report of three Trinity masters upon the merits of the case.

pounds five shillings, and condemned the said Robert Hutton, Shepherd's party, in the sum of five hundred and two pounds twelve shillings and sixpence, the moiety of the value of the said ship and cargo, and at the petition of Cooper decreed a monition against the said Robert Hutton for payment of the said sum in fifteen days after service of the same, not to go under seal till after fifteen days from hence; and the judges directed the costs on both sides, as well in this Court as in the Court below, to be borne and sustained by both parties in equal proportions, and referred the bills on both sides to the registrar, and assigned to hear on taxation of costs the first session of next term; present Shepherd and Cooper."

It is evident from the various orders made in this case that the Delegates had very great difficulty in arriving at a decision. The two Trinity masters by whom they were assisted differed in opinion as to the merits, and by consent of the parties a third was called in.

The Resolution and *The Langton* (1789).

The third case of the year 1789 was *The Resolution* and *The Langton* (*k*). This is in one respect the most remarkable of the three cases, for in it Sir James Marriott decided, in terms apparently chosen in order to raise the question whether the *rusticum judicium* may be applied where the collision occurs without fault in either ship, that it did apply to such a case; and from his decision there was no appeal. The registrar's note of the interlocutory decree is as follows:—

"Sir J. Marriott, Judge, pronounced that the loss of the ship and cargo of *The Resolution* was not occasioned by the default of the masters and crews of either of the ships in question, but was an inevitable accident, owing to the showring weather, the darkness of the night, the small distance of the two ships, and shortness of time in discovering each other, being close; and the judge decreed that the damages on the loss of the ship *Resolution* and her cargo, as well as the damage done to the ship *Langton*, together with the costs of suit on both sides, be equally borne by both parties; and assigned each party to bring in a schedule of their damages;

(*k*) *Nom. Nelson* c. *Faucett* in the Assignation Book.

which being brought in the judge referred the same to the registrar, taking to his assistance two merchants" (*l*).

The Three Relations and *The Britannia* (1788).

It should be added that in the year (1788) previous to that in which the three last-mentioned cases were decided, occurred the case of *The Three Relations* and *The Britannia* (*m*). There Sir James Marriott pronounced that "under the circumstances of the case, each party should stand by his own damage and expenses." What the circumstances of that case were, does not appear from the registrar's minute book, from which the decree is here cited. The decree is unusual in form; the common form, where (as here) fault is alleged and not proved, being to the effect that the plaintiff's libel not having been proved, the adverse party be dismissed from further observance of justice in the cause.

Lord Stowell's dicta in *The Woodrop Sims* and *The Lord Melville*.

It is singular that during the long period (*n*) during which Lord Stowell presided over the Admiralty Court no case occurred in which that distinguished exponent of maritime law had occasion to apply the rule of division of loss. Two cases should, however, be here mentioned, both of great importance in the history of the subject. In *The Woodrop Sims*, decided by Lord Stowell (then Sir William Scott) in 1815, and in *The Lord Melville*, decided in 1816, occur the dicta of that learned judge with reference to the incidence of loss in case of collision, which, having been cited and approved by Lord Giffard in *Hay* v. *Le Neve* in the House of Lords (*o*), have for the last half-century been relied on as containing an accurate statement of the law of the English Admiralty with reference to the incidence of loss in case of collision. These dicta—one of which is quoted at length on a former page (*p*)—divide collisions into four classes: (1) where the collision is caused by the fault of the defendant ship; (2) by the fault of the plaintiff ship; (3) by the fault of both ships; (4) without fault

(*l*) This decision is in accordance with the statement of the law in Brown's Admiralty Law, vol. 2, p. 206: "In case of accident the loss was divided between both parties in equal proportions."

(*m*) *Faye* c. *Graham*, 26th March, 1788.

(*n*) Thirty years, 1798–1828.

(*o*) See *Hay* v. *Le Neve*, 2 Shaw's (Sc.) App. Cas. 395, where the dicta are set out. *The Woodrop Sims* is reported in 2 Dods. 83; *The Lord Melville* is not reported.

(*p*) *Supra*, p. 125.

in either ship. The rule of division of loss is declared to be applicable only in the third case, namely, where the collision is caused by the fault of both ships. Before discussing the accuracy of this statement of the law, it will be convenient to trace the application of the rule by the light of the decisions subsequent to the year 1789.

Hay v. *Le Neve.*

In 1824 *Hay* v. *Le Neve* was decided by the House of Lords. That was an appeal from a decision of a Scotch Court, which had apportioned in unequal shares (*q*) the loss suffered by a vessel, *The Wells*, which had been sunk at her anchor by *The Sprightly*. The House of Lords varied the decision of the Scotch Court, and, relying upon the dicta of Lord Stowell above mentioned, divided the loss in equal shares, and condemned the owners of *The Sprightly* in half the loss on the *The Wells*. In that case both ships were clearly in fault; *The Wells* for having brought up in an improper place and for not showing a light, *The Sprightly* for negligent navigation and want of look-out. The question in dispute was, whether the division of loss should be in equal shares or be apportioned according to the degree of fault in either vessel. The decision was in accordance with Lord Stowell's dicta, and, it may be added, with an unbroken line of authorities for a period of at least 146 years, in favour of an equal division. But there was no decision that the rule of division of loss was confined, as stated by Lord Stowell, to the case of "both ships in fault." Nevertheless, since the decision in *The Resolution* and *The Langton* the rule has never been applied, except in the case of "both ships in fault"; and the dicta of Lord Stowell, having acquired additional weight by the citation in the House of Lords in *Hay* v. *Le Neve*, have been taken apparently without discussion, to settle the law. Thus in *The Catherine of Dover* (*r*) (1828) Sir Christopher Robinson, in addressing the Trinity masters, stated the law as follows:—"The result of the evidence will be one of three alternatives;

(*q*) *The Sprightly* was condemned in two-thirds of the loss suffered by *The Wells*.

(*r*) 2 Hag. 145. Cf. also *The Maid of Auckland* (1848), 6 Not. of Cas. 240, where there were cross actions, and Dr. Lushington dismissed both for want of proof; *The Laconia*, 2 Moo. P. C. C. N. S. 161 (1863), where a similar order was made by the Privy Council; *The Marpesia* (1872), L. R. 4 P. C. 212.

either a conviction in your mind that the loss was occasioned by accident, in which case it must be sustained by the party on whom it has fallen; or a state of reasonable doubt as to the preponderance of evidence, which will have nearly the same effect; or, thirdly, a conviction that the party charged with being the cause of the accident is justly chargeable with the loss of this vessel according to the rules of navigation which ought to have guided them."

The Monarch (1838).

It remains only to mention the case of *The Monarch* and *The Success*, decided by Sir Christopher Robinson on the 23rd of June, 1838, as being the next in which the *rusticum judicium* was applied. There the judge pronounced "the collision in question in this cause to have been caused by the fault of the masters and crews of the said ship or vessel *Monarch* and the late smack *Success*, and for a moiety only of the damages proceeded for, and condemned [the owners of *The Monarch*] and the bail given on their behalf to answer the action in a moiety of such damage and of the costs incurred on behalf of [the owner of *The Success*] in this cause"(*s*). This decree was subsequently, on the 31st of January, 1839, rescinded by Dr. Lushington as regards costs; and by a new decree he pronounced the parties "to be liable to the costs incurred on their own behalf only"(*t*).

History of the rule since 1789.

This completes the history of the application of the rule, so far as the present writer has been able to trace it by an examination of the Admiralty records. Since the year 1838, the date of the decision in *The Monarch*, the number of collision cases has been very large, and the *rusticum judicium* has been frequently applied; but always, it may be safely assumed, in cases of "both ships in fault." In *The Oratava* and *The Janet*, 11th May, 1839, and *The London Merchant*, 20th May, 1840, it was so applied; and beyond this the examination of the minute books has not been carried. It may be assumed that if, since 1840, the rule had been applied in any case of "neither ship in fault," or "insufficient proof," such a case would have been reported; and no such case appears in the books. It

(*s*) This is the case called *The Monarch*, and referred to in a note to *The Celt*, 3 Hag. 321.

(*t*) *The Monarch*, 1 W. Rob. 21.

may, therefore, be taken to be a fact that for fully a century (since 1789) the rule has only been applied in cases of "both ships in fault"; never in the case of "neither in fault," or in the case of "insufficient proof." Nay, further, in such cases the plaintiff's action has invariably been dismissed, and generally with costs. Several instances of this will be found referred to in a former page (*u*). Yet neither has the decision of Sir James Marriott in *The Resolution* and *The Langton*, nor have any of the previous decisions between the years 1677 and 1789, in which the *rusticum judicium* was applied in cases of doubt and mere accident, been reversed, overruled, or, so far as the writer is aware, even referred to (*x*) or discussed. Not having been reported they appear to have altogether escaped observation; so much so that in *Hay* v. *Le Neve* (1824) Lord Giffard states that the advocates (of whom Dr. Lushington was one) who appeared in that case, in answer to a question from the House, acknowledged that they were not aware of any case in which the *rusticum judicium* had ever been applied in England. A note of *The Petersfield* was supplied to the House by Lord Stowell, who was a member of the House, but does not appear to have heard the appeal. It is singular that that learned judge was not (it seems he was not) aware of the decisions in *The Resolution* and in *The Friends Goodwill*, both of which occurred in 1789, the year of the decision in *The Petersfield*, and of which one was in direct conflict with his dicta in *The Woodrop Sims* and *The Lord Melville*.

It remains to be decided whether the decisions in *The Resolution* and earlier cases applying the *rusticum judicium* in cases of doubt and mere accident are law at the present day. Notwithstanding the length of time during which those cases have been ignored, it is not clear that the rule may not even now in Admiralty be applied in the one or both of these cases, which in its ancient and wider shape it was evidently intended

(*u*) See the cases cited above, p. 154, note (*r*). To these may be added the following decisions of Lord Stowell: *The Flora*, 28th June, 1815; *The Robert*, 9th June, 1818; *The Vrow Janetze*, 2nd Feb. 1820; *The Betsy Caines* (1827), 2 Hag. 28; *The Marpesia* (1872), L. R. 4 P. D. 212.

(*x*) In *Hay* v. *Le Neve*, a case in the reign of Queen Anne was referred to (*semble*, one of the cases decided between 1707 and 1718 cited above), but not with reference to the point here under discussion.

to meet. Its application and limitation to the case of "both ships in fault" we have seen is not a century old.

It is worthy of notice that in the so-called case of inevitable accident, until recently, no costs were given on either side (*y*). This rule of the Admiralty, now obsolete, is a trace of the quasi-equitable principle which is at the root of the *rusticum judicium*. In the last century the defendant was frequently (*z*) dismissed without any order being made as to costs; and though no reason is assigned for depriving him of his costs, it seems probable that it was either upon the ground that the collision was accidental, or that both ships were in fault, or that the cause of the collision was left in uncertainty.

With regard to the dicta of Lord Stowell in *The Woodrop Sims* and *The Lord Melville* it must be remarked that they are mere dicta, unnecessary for the decision of the cases in which they occur; that they acquired no additional authority by the extra-judicial approval they received in the House of Lords in *Hay* v. *Le Neve*. In *The Lord Melville* there was no question as to the scope or application of the *rusticum judicium*, the decision being that the defendant ship was alone in fault. In *Hay* v. *Le Neve* both ships were in fault, so that no question arose as to the application of the rule where neither ship is in fault, or where the cause of collision is doubtful.

The view of the Legislature, as shown by sect. 25, sub-sect. 9, of the Judicature Act, clearly was that the rule applies only where both ships are in fault. It cannot be supposed that an Act passed manifestly with a view to make the law uniform in all the Courts, would have left the rule of division of loss applicable in Admiralty in case of doubt and mere accident, whilst, for the sake of uniformity, it extended the rule where both ships are in fault to the Common Law Divisions of the High Court.

(*y*) See further as to costs, *infra*, p. 328.

(*z*) *E.g. Dove* c. *Masters*, *The Elizabeth* and *The Eleanor*, 4th March, 1696; affirmed on appeal, 22nd June, 1698; *Lambert* c. *Simpson* and *Lorimer* c. *Lambert*, *The Friends* and *The Hopewell*, 11th March, 1696; *The North Lyon* and *The Phœnix*, 26th May, 1709 (on app.), 19th Dec. 1712; *Baker* v. *Malin*, *The Hunter* and *The Amity's Friendship*, 2 Sess. Hil. Term, 1764; *Milton* c. *Maundrell*, *The Blessing* and *The John and Sarah* (on app.), 8th Nov. 1720.

NOTE II.

Law of Foreign Countries as to Division of Loss.

Law of America,

In America the rule as to the incidence of loss by collision is the same as that of this country; except, perhaps, in the case of inscrutable fault, where, according to some writers, the loss is divided: *The Tracy J. Bronson*, 3 Bened. 341; and see 1 Parsons on Sh. (ed. 1869) 527; Story on Bailments, § 609; 3 Kent's Comm. § 231; Sedgwick on Damages (6th ed.) 577, note; but in a recent case before the Supreme Court it seems to have been the opinion of the Court that in such a case neither ship could recover: *The Clara*, 12 Otto, 200; and see *The Breeze*, 6 Bened. 14.

France,

Art. 407 of the French Commercial Code is as follows: En cas d'abordage de navires si l'événement a été purement fortuit, le dommage est supporté, sans répétition, par celui des navires qui l'a éprouvé. Si l'abordage a été fait par la faute de l'un des capitaines, le dommage est payé par celui qui l'a causé. S'il y a doute dans les causes de l'abordage, le dommage est réparé à frais communs, et par égale portion, par les navires qui l'ont fait et souffert. Dans ces deux derniers cas, l'estimation du dommage est faite par experts. The case of inscrutable fault is that described in Art. 407—"s'il y a doute," &c.—that is, "lorsqu'il est impossible de préciser par la faute de qui le dommage est arrivé." In this case the French differs from the English law in dividing the loss equally—Abordage Nautique, Caumont, § 151. But the French law agrees with our own in requiring proof of negligence to enable the cargo-owner to recover in such a case; *ibid.* §§ 154, 155. Where both ships are in fault, but not to the same extent, the damages are apportioned according to the degree of each ship's fault; but as between shipowners and third parties, the former are severally liable for the whole of the damages, subject to the right of each to free himself by abandonment of his interest in the ship and freight; *ibid.* §§ 12, 108, 152. Where both ships have been guilty of an infringement of the Rule of the Road (manœuvres réglemen-

taires), it seems that neither can recover; *ibid.* § 109. The case of inevitable accident is complicated by attempts to attribute the collision partly to "force majeure," and partly to negligence; *ibid.* § 94.

By the Belgian Commercial Code of 1879 (Bk. II., Art. 228), the loss in cases of pure or inevitable accident lies where it falls; where both ships are in fault the sum of the damages is borne by both in amounts proportional to the blame of each. (Art. 229.) Belgium,

The law in Germany as to the incidence of loss in the four cases of collision seems to be the same as that of this country; except that where both ships are in fault, neither can recover. See German Commercial Code, Arts. 736—741. Germany,

By the Dutch Code, where both ships are in fault, and also when the collision occurs without fault in either ship, each bears her own loss. If there is doubt whether the collision was caused by the fault of one or both ships, or not, the aggregate loss upon both ships and cargoes is made good by a general average contribution between the owners of ships and cargoes. Where a ship under way goes foul of another at anchor, even if the collision is an inevitable accident, the ship under way has to pay half the loss. These rules apply only to sea-going ships, and not to inland navigation. See the Commercial Code of Holland, Arts. 534—540, 756. Holland,

By the Italian Commercial Code of 1883 (Bk. II., Arts. 660, 662), if a collision is the result of accident or *force majeure*, the loss lies where it falls. If it cannot be decided which ship is to blame, or if both are to blame, each ship bears its own loss, and is liable for the whole of the damage and loss to goods shipped, and for the compensation for personal injuries. Italy,

The provisions of the Spanish Code of 1886, on these points (Bk. III., Arts. 826, 827), are substantially similar to those of the Italian, except that the clause relating to personal injuries is omitted. This Code (Arts. 826, 837) imposes on the owner of the ship, by whose fault the collision was occasioned, the responsibility which under the former Code seems to have attached only to the actual wrongdoer (*a*). Spain,

(*a*) See 2nd ed. of this work, p. 163.

Portugal, The provisions of the Portuguese Code of 1888 are similar as regards collision occasioned by accident or *force majeure* to those of Belgium; as regards cases of doubt or both to blame, to those of Italy.

Russia, The Russian Code is not clear as to the incidence of loss. Where the collision is an inevitable accident, and where both ships are in fault, it seems that the loss rests where it falls; Arts. 835, 845. But in some cases the total loss on the ships, though not on cargo, is borne by the two rateably; Art. 847. See Russian Code, Arts. 835—848 (*a*).

Norway and Sweden, By the Codes of Norway (Art. 80) and Sweden (Art. 172), the law as to incidence of loss is the same as that of this country; except where both ships are in fault, in which case the Court decides, according to the nature of the fault and other circumstances of the case, whether any damages are to be paid by one ship to the other, and their amount.

Egypt, By the Code of Egypt (Art. 242), the law is the same; except in the case of both ships being in fault. In that case the loss is made good by the two ships in proportion to their respective values—*proportionnellement à leur valeur respective.*

St. Lucia, Art. 2360 of the Civil Code of St. Lucia divides the loss where the cause of collision is doubtful; and also where both ships are in fault.

Canada. By 43 Vict. c. 29 (Canada) the rule of division of loss is applied to the common law Courts. It applies to collisions between rafts as well as between ships.

(*a*) A new code (see Nautical Magazine, 1884, p. 944) has been promulgated in Russia, to which the writer has not had access. Its effect is substantially the same, upon the point under consideration, as the former code, which is that referred to in the text. Since the first publication of this work, the articles of the foreign codes here summarized have been collected and set out at length in an article published in the Nautical Magazine, 1881, p. 537, entitled "The Law of Damages caused by Collisions at Sea," by F. W. Raikes, Esq., LL.D. The statements in the text as to the codes of Norway and Sweden are taken from that article.

Translations by the same learned author of the recent Codes of Belgium, Italy, and Spain (the last-mentioned still unfinished) have appeared in various numbers of the Law Magazine of 1884—1891. The references to these Codes are derived from those translations, and the present writer is indebted to the courtesy of the translator for his information regarding the Code of Portugal.

CHAPTER VII.

LIMITATION OF LIABILITY.

Limitation of liability is statutory.

In this country the limitation of shipowners' liability depends entirely upon statute. It is said by writers of authority that by the maritime law the shipowner's liability for collision is limited to the value of ship and freight (*a*). Whether such a rule of the maritime law (*b*) ever existed, it is immaterial here to inquire. No such rule has ever been recognized by the Courts of this country, either at

Maritime and foreign law upon the subject.

(*a*) 3 Kent's Comm. § 218; 4 Phillimore's International Law, 2nd ed. 628; Valin sur l'Ordonnance de la Marine, l. 2, tit. 8, Art. 2; Cours de Droit Comm. Mar. Boulay-Paty, vol. i. 263—298; Pardessus Droit Commercial, Part 4, tit. 2, ch. 3, s. 2; Emerigon Cont. à la Grosse, ch. 4, s. 11; and see *per* Bradley, J., in *The Jos. W. Dyer* v. *The National Steamship Co.*, 14 Blatchf. 483, 487; and *per* Ware, J., in *The Rebecca*, Ware's Rep. 188, 195, 198; *The Phebe*, Ware, 263. The Consolato del Mare, cap. 141, provides that in certain cases the ship herself, and the managing owner, shall be liable to the merchant for the loss of his goods, but the other owners only to the extent of their shares: "E si la nau no bastava, e lo Senyor de la nau havia bens e altre loch, deven se n' vendre tanto en tro que l' mercader sia entregrat; mas los personers no sien tenguts sino tant solament d'aco que la part valra que hauran en la nau." So, again, *ib.* cap. 182, if the merchant's goods are injured by reason of insufficient ground tackle, the managing owner is to pay for the damage, for which the ship and all his goods are liable: "*Mas los personers no son tenguts de res esmenar sino la part que hauran, en la nau, que altres bens no.*" But it seems that for damage caused by their own fault, as where the ship's equipment is deficient, the part owners were liable to the full extent: see *ibid.* c. 194.

Upon contracts with reference to the ship entered into by his agent (committee, in the association called *commande*), it seems that the shipowner was liable only to the ship's value: see *ibid.* cc. 209, 244, *infra*, p. 163.

(*b*) As to whether a general maritime law binding upon the Courts of this country ever in fact existed, see *per* Willes, J., *Lloyd* v. *Guibert*, L. R. 1 Q. B. 115, 124; *per* Brett, L. J., *The Gaetano*, 7 P. D. 143; *The Leon*, 6 P. D. 148; *The Patria*, L. R. 3 A. & E. 436, 461, 462.

common law or in Admiralty (*c*). By the municipal laws of Holland, France, and other continental nations, the liability of shipowners not only for the torts but also for the contracts of the master of their ship, has for more than two centuries been limited to the value of the ship and freight (*d*). It is perhaps due to this fact that limited liability has been said to be a principle of the general maritime law. But its origin cannot be traced either to the Roman law or to any of the mediæval codes of maritime law. In both these systems it is either clearly implied or expressly stated that the wrong-doer in a collision shall make full compensation (*e*).

(*c*) See *The Dundee*, 1 Hag. Ad. 109, 120; *The Carl Johann*, referred to 3 Hag. Ad. 186; *The Aline*, 1 W. Rob. 111; *The Volant*, *ib.* 383; *The Mellona*, 3 W. Rob. 16, 20; *The Wild Ranger*, Lush. 553, 564; *Wilson* v. *Dickson*, 2 B. & Ald. 2; *Gale* v. *Laurie*, 5 B. & C. 156, 164; *Cope* v. *Doherty*, 4 K. & J. 367, 378; *Stoomvaart Maatschappy Nederlands* v. *Peninsular and Oriental Steam Navigation Co.*, 7 App. Cas. 795, 814. The *dictum* of Parke, B., in *Brown* v. *Wilkinson*, 15 M. & W. 398, appears to be incorrect.

(*d*) Emerigon Contr. à la Grosse, ch. 4, s. 11; Boulay-Paty Cours de Droit Commercial Maritime, vol. i., pp. 263—298. See also *The Mary Ann*, L. R. 1 A. & E. 8, 11; and the articles of foreign codes cited at the foot of this chapter.

(*e*) As to liability for collision by the Roman law, see Dig. lib. 4, tit. 9; Dig. lib. 44, tit. 7, fr. 5; Dig. lib. 45, tit. 5, fr. 1; 3 Kent's Comm. 218; *per* Ware, J., in *The Phebe*, Ware's Rep. 263; Loccentius, c. 8, s. 11.

As to the mediæval codes, the Laws of Oleron, Art. 15, clearly assumes that the wrong-doer shall pay full damages—*tous ses dommages —tot ses dammatges;* see 1 Twiss' Black Book, 108; *ibid.* vol. ii., pp. 229, 449. So the Consolato del Mare, cap. 155: "*E si dan li fa, deulo li tot esmenar e restituar*," but if the collision is accidental, "no li sia tengut de esmenar tot lo dan . . . per ceo car no es sa culpa:" and see *ibid.* cap. 158, to the like effect.

The language of the codes of Northern Europe is the same: Dat Gotlandsche Water-Recht (the Wisbuy Sea Laws), Art. 29: *De schipper is schuldich myt synen schjpluden to delende den schaden mank sik.* The Laws of the Osterlings (Hamburgh Code), Art. 23: unless the master of the ship that does the damage swears that he did it unwittingly, *he schal eme gans den schaden beteren;* 4 Twiss' Black Book, 373; and in like case by the Gotland Code, Art. 65, *so schal hre eme den schaden al hel gelden.* And by the Flanders Sea Laws, Art. 15, the master who lays out his anchor so as to damage another ship, *si siin dat wel sculdich te beteren;* and Art. 31 of the Gotland Code in like case he is *schuldich to beterende;* 4 Twiss' Black Book, 88. So the rule as to dividing the loss assumes that, but for it, the ship run down would recover *alle die schade* (Flanders Code), *alle den schaden* (Gotland Code, Art. 30, 4 Twiss' Black Book, 88). In the Instructions to the Admiral in the Black Book of the Admiralty, dating circ. 1337—1351 (1 Twiss, 37), the wrong-doer in a collision is to make *plaine amende.*

The contract of *commande*, or joint adventure of shipowners and merchants, corresponding in some respects to the *société en commandite*, or partnership with limited liability, of modern times, is perhaps the origin of the widespread doctrine of limited liability of shipowners. This kind of association extensively prevailed in the Mediterranean in the Middle Ages, and is frequently mentioned in the Consolato del Mare (*f*). As regards third parties, it seems that the liability of the shipowner upon contracts entered into by his agent, or committee in such an association, with reference to the ship, was limited to the value of the ship (*g*).

It originated perhaps in *commande*.

It is not until the beginning of the seventeenth century that we find protectionist doctrines put forward upon grounds of public policy as a reason for limiting shipowners' liability. Grotius, writing in the year 1625, says that the principle of limitation of owners' liability upon the contracts of the master prevailed in his day, and for a long time previously had prevailed in Holland (*h*). And he approves the principle as being consonant with natural justice, and necessary for the encouragement of shipping (*i*). Liability for collision is not expressly noticed, but the policy of protection, which limited liability in the case of his contracts, no doubt applied equally to protect owners from liability for their master's torts. The rule of continental law which limits the shipowner's liability upon his master's contracts, has never been adopted in England;

Protection is at the root of it. So avowed by Grotius.

(*f*) See 6 Pardessus Lois Maritimes, tit. Commande, Index.

(*g*) Cf. Consolato del Mare, cap. 244: "Qui la dita nau o leny li haura comanat, los es tengut di tot lo dit dan e greuge a restituir, si la dita nau o leny ne sabia esser venut, ab que per culpa d'aquell a qui ell haura la dita nau o leny comanet, los sia es devengut lo dit dan o greuge." A similar provision as to the sale of the ship is contained in cap. 209.

(*h*) De Jure Belli et Pacis, l. 2, ch. 11, s. 18: "Apud Hollandos ubi mercatura pridem maxime viguit . . . et nunc et olim constitutum ne exercitoriâ etiam universi (exercitores) amplius teneantur quam ad æstimationem navis, et eorum quæ in navi sunt."

(*i*) "*Absterrentur enim homines ab exercendis navibus si metuant ne ex facto magistri quasi in infinitum teneantur*": *ibid.*

the liability of a shipowner upon contracts entered into by the master as his agent having always been, as it is at the present day, unlimited.

Analogy of noxal action —*noxæ deditio*.

More than one writer (*k*) has pointed out the analogy between the law which limits shipowners' liability to the value of ship and the noxal action—*noxæ deditio*—of the Roman law. The law of deodand has also been thought to be founded on the same idea—that which personifies the inanimate object (*l*) which does the injury and identifies it with the actual wrong-doer. In the face of the express provisions of the Code of Oleron and other sources of English maritime law, which require the wrong-doer to make full compensation to the sufferer in a collision, there is difficulty in accepting this view as to the origin of limited liability.

Connection between limitation of liability and division of loss.

The principle of unlimited liability, which seems to have been adopted from the civil law into the mediæval codes, was to some extent modified by the rule of division of loss in the case of inevitable accident. And in some of the later codes there are traces of the rule of division of loss being extended to cases of collision by negligence (*m*). We have seen in a former chapter that the rule as to division of loss was probably applied somewhat loosely, and without much discrimination as to whether the collision was due to negligence or not. In this way losses by collision were doubtless distributed, and the shipowner's liability was in a sense limited; but the recognition of the principle of limitation of liability to the value of ship and freight belongs to a later date.

Connection between limited liability and arrest of the ship.

In the case of damage done by a ship belonging to foreigners resident abroad, and where service of a writ of summons cannot be effected, the damages recoverable are,

(*k*) See Bynkershoek, Quæst. Jur. Priv. l. 4, c. 20; Holmes on the Common Law, p. 30.

(*l*) See above, pp. 75 *seq.*, as to personification of the ship.

(*m*) See Droit Maritime de la Suède, 3 Pardess. 129, 173, 174; Dantzic Sea Laws, Art. 51, 4 Twiss' Black Book, 349.

in practice, limited to the value of the ship and freight, the *res* arrested by the Admiralty Court. The statutory limit of liability is doubtless connected with this fact; but the arrest of the ship was adopted, in the first instance, in order to compel her owners to appear, and not because their liability was limited to the value of the ship (*n*).

History of English legislation upon the subject.

The history of the singular legislation in this country which prevents the sufferer in a collision between ships from recovering damages beyond a sum fixed by reference to the size of the instrument with which the damage is done, is as follows: Until the year 1734, by the common law of England and by the maritime law as administered in the Admiralty Court of this country, the liability of shipowners for damages by collision was, as has been stated above (*o*), unlimited. In that year an Act, 7 Geo. II. c. 15, was passed limiting shipowners' liability for loss of cargo by theft of master or crew to the value of the ship and freight (*p*). This Act was passed in consequence of the decision in *Boucher* v. *Lawson* (*q*), by which the shipowners were held liable for loss of a cargo of bullion taken on board in Portugal and afterwards stolen by the master. The fact that Holland, and other maritime nations of Europe, had previously passed similar laws

7 Geo. II. c. 15.

(*n*) *The Bold Buccleugh*, 7 Moo. P. C. C. 267, 283; and *supra*, p. 80. The *dictum* of Parke, B., to the contrary in *Brown* v. *Wilkinson*, 15 M. & W. 391, is probably incorrect.

(*o*) See *supra*, p. 161, note (*a*).

(*p*) *Sutton* v. *Mitchell*, 1 T. R. 18, is a decision under this Act, that the owners were not liable beyond the statutory limit for a robbery of cargo in which one of the crew was concerned.

(*q*) Cas. temp. Hardw. 85; see *per* Buller, J., *Yates* v. *Hall*, 1 T. R. 75, 78. *Boucher* v. *Lawson* is clearly the case referred to in the petition of shipowners set out in the Journals of the House of Commons, Sess. 1733, p. 277. The petitioners, after referring to the decision, complain that they, "when they became owners of ships, did not apprehend themselves exposed to such hazard, or liable as owners to any greater loss than that of the ships and freight; and of the insupportable and unreasonable hardships to which our laws in this case subject them; and to which no owners of ships are exposed in other trading nations;" and they represent to the House "that, unless some provision be made for their relief, trade and navigation will be greatly discouraged, since owners of ships find themselves, without any fault on their part, exposed to ruin," &c. &c. &c.

for the protection and encouragement of their shipping, appears to have influenced the Legislature in passing the measure (*r*). By 26 Geo. III. c. 86, the relief afforded by the previous Act was extended to cases of theft by persons other than the crew, and to cases of loss by fire (*s*). Limitation of liability in case of collision was first created by 53 Geo. III. c. 159. This Act, after reciting that it was expedient to encourage the owning of British ships (*t*), fixed the limit of shipowners' liability for damage to other ships and to cargo on board either of two ships in collision at the value of the ship sued and the freight she was earning or under contract to earn. The Act was confined to sea-going British ships, and under it questions arose as to the amount of the shipowners' liability when freight had been paid before the collision (*u*), or never earned (*x*), as to the time at which the ship's value was to be taken for the purpose of the Act (*y*), and as to the ship's appurtenances which were to be included in the valuation (*z*).

26 Geo. III. c. 86.

53 Geo. III. c. 159.

By 17 & 18 Vict. c. 104, ss. 504, 505, the same limit was fixed for damages recoverable for loss of life or personal injury, with a provision that in such cases the value

17 & 18 Vict. c. 104, ss. 504, 505.

(*r*) See *per* Lord Stowell, *The Dundee*, 1 Hag. Ad. 109, 121; *per* Abbott, J., *Gale* v. *Laurie*, 5 B. & C. 156, 163; *infra*, p. 169; *per* Lord Blackburn, 7 App. Cas. 812; and see *supra*, p. 163. The Commons Journals for the year 1733 contain several petitions from shipowners for relief in other matters. Another Act of the same year—53 Geo. 3, c. 87—was passed for their relief. As to foreign law on the subject at the present day, see the note at the foot of this chapter, *infra*, p. 181.

(*s*) *Hunter* v. *McGowan*, 1 Bligh, N. S. 573, was a decision that this Act did not apply to inland craft, such as a Clyde gabbert.

(*t*) There does not appear to have been any considerable discussion in Parliament upon the principle of either this or the subsequent Acts limiting shipowners' liability. See Commons Journals, vol. 68, p. 670; 133 Hansard's Parl. Deb. pp. 574 *seq.* Upon the Act of 1862 there was some discussion of details, but little was said as to the principle or policy of the Act: Hansard, vol. 165, p. 1932; vol. 166, pp. 2217 *seq.*; vol. 167, pp. 735, 750; vol. 168, pp. 1 *seq.*

(*u*) *Wilson* v. *Dickson*, 2 B. & Ald. 2.

(*x*) *Cannan* v. *Meaburn*, 1 Bing. 465.

(*y*) *Brown* v. *Wilkinson*, 15 M. & W. 391.

(*z*) *The Dundee*, 1 Hag. Ad. 120; *Gale* v. *Laurie*, 5 B. & C. 156; *The Triune*, 3 Hag. Ad. 114, *infra*, p. 172, were decisions under this Act.

of the ship should be taken at not less than 15*l.* per ton (*a*); and the statutory limitation was extended to foreign as well as British ships. Under all these Acts the value of the ship and freight at or immediately before the collision had to be ascertained, a fruitful source of litigation and expense.

To obviate this (*b*), and also in order that bad and inferior ships should not have an advantage, in case of collision, over good and valuable ships (*c*), the existing Act, 25 & 26 Vict. c. 63, was passed. That Act (s. 54) struck a rough average value for all ships at 15*l.* or 8*l.* per ton, the valuation to be at the higher or lower rate according as the collision was accompanied by loss of life or personal injury or not. It repealed (s. 2) 17 & 18 Vict. c. 104, s. 504, and enacted (s. 54) as follows:— 25 & 26 Vict. c. 63, s. 54.

"The owners of any ship, whether British or foreign, shall not, in cases where all or any of the following events occur without their actual fault or privity, that is to say:

"(1) Where any loss of life or personal injury is caused to any person being carried in such ship;

"(2) Where any damage or loss is caused to any goods, merchandize, or other things whatsoever on board any such ship;

"(3) Where any loss of life or personal injury is, by reason of the improper navigation of such ship as aforesaid, caused to any other ship or boat, or to any goods, merchandize, or other things whatsoever on board any other ship or boat;

be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage

(*a*) *Nixon* v. *Roberts*, 1 J. & H. 739; *Leycester* v. *Logan*, 4 K. & J. 725; *Dobree* v. *Schroder*, 6 Sim. 291; 2 M. & Cr. 489; *Grainger* v. *Martin*, 2 B. & S. 456; *African Steamship Co.* v. *Swanzy*, 2 K. & J. 660, are decisions under this Act.

(*b*) See *per* Lord Blackburn, 7 App. Cas. 811, 815.

(*c*) Hansard, Parl. Debates, vol. 165, p. 1932, Mr. Milner Gibson's speech on introducing the Bill; Lindsay's History of Merchant Shipping, vol. 3, p. 408.

to ships, boats, goods, merchandize, or other things, to an aggregate amount exceeding fifteen pounds for each ton of their ship's tonnage; nor in respect of loss or damage to ships, goods, merchandize, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage; such tonnage to be the registered tonnage in the case of sailing-ships, and in the case of steam-ships the gross tonnage, without deduction on account of engine-room.

"In the case of any foreign ship which has been or can be measured according to British law, the tonnage as ascertained by such measurement shall, for the purposes of this section, be deemed to be the tonnage of such ship.

"In case of any foreign ship which has not been and cannot be measured under British law, the surveyor-general of tonnage in the United Kingdom, and the chief measuring officer in any British possession abroad, shall, on receiving from or by direction of the Court hearing the case such evidence concerning the dimensions of the ship as it may be found practicable to furnish, give a certificate under his hand, stating what would, in his opinion, have been the tonnage of such ship if she had been duly measured according to British law; and the tonnage so stated in such certificate shall, for the purposes of this section, be deemed to be the tonnage of such ship."

Foreign ships' tonnage.

By a subsequent section (s. 60) the Act provides that upon an Order in Council being made in that behalf, the ships of any foreign country shall, for the purposes of the Act, be taken to be of the tonnage specified in their certificates of registry. Orders in Council of the following dates have been made with respect to the ships of America, United States, 30th July, 1868; Austria, 19th August, 1871; Belgium, 17th October, 1884; Denmark, 29th February, 1868, 30th December, 1878; France, 5th May, 1873; Germany, 23rd July, 1889; Greece, 14th

August, 1879; Hayti, 3rd May, 1882; Italy, 30th September, 1873; Japan, 27th January, 1885; Netherlands, 3rd May, 1888; Norway, 17th May, 1876, 2nd February, 1884; Russia, 20th November, 1880; Spain, 17th March, 1875, and 5th August, 1875; Sweden, 17th March, 1875, 3rd May, 1882, and 18th August, 1882 (*c*).

Justice of Act questioned.

The preamble of 53 Geo. III. c. 129, shows that the policy of the Acts limiting owners' liability was deliberately adopted by the Legislature with a view to encourage shipping (*d*). But the justice of the Acts has often been called in question (*e*); and the opinion has been expressed that, interfering as they do with the common law right of the injured person to recover full damages, they are to be construed "strictly," that is to say, in such a way as to abridge as little as possible the common law right of the sufferer (*f*). But there is no valid reason why the Act should be read otherwise than according to the fair and natural meaning of its terms; and this was the view taken by Butt, J., in the most recent case (*g*).

It applies to all ships, and in all waters.

This Act (25 & 26 Vict. c. 63, s. 54) applies in every case of collision, whether the ships are both British or both foreign, or one British and one foreign; whether the collision occurs in British or in foreign waters or on the high seas (*h*); and whether the action is in Admiralty or at

(*c*) See 52 & 53 Vict. c. 43, s. 6.

(*d*) *Per* Dr. Lushington in *The Amalia*, 1 Moo. P. C. C. N. S. 471, 473, "The principle of limited liability is that full indemnity, the natural right of justice, shall be abridged for political reasons." See further as to the policy of the Act the note at the foot of this chapter.

(*e*) See *The Northumbria*, L. R. 3 A. & E. 6, 13; *Chapman* v. *Royal Netherlands Steamship Co.*, 4 P. D. 157, 184; *The Andalusian*, 3 P. D. 182, 190; *The Ettrick*, 6 P. D. 127, 136, "an Act sufficiently tyrannical as it is," *per* Brett, L. J. This opinion has not always been shared, see *per* Mellish, L. J., 8 Ch. D. 252; *per* Butt, J., 9 P. D. 21.

(*f*) See *per* Abbott, C. J., in *Gale* v. *Laurie*, 5 B. & C. 156, 163, "Their effect, however, is to take away or abridge the right of recovering damages enjoyed by the subjects of this country at the common law; and there is nothing to require a construction more favourable to the shipowner than the plain meaning of the words import;" and *per* Brett, L. J., 4 P. D. 184; 6 P. D. 136; *per* Dr. Lushington in *The Benares*, 14 Jur. 581.

(*g*) *The Warkworth*, 9 P. D. 20.

(*h*) *The Amalia*, 1 Moo. P. C. C. N. S. 471; Br. & Lush. 151.

common law (*g*). Some British colonies have passed laws which differ in terms and in effect from the Imperial Act (*h*).

Tonnage measurement.

The enactments relating to tonnage measurement are 17 & 18 Vict. c. 104, ss. 20—29; 30 & 31 Vict. c. 124, s. 9; 34 & 35 Vict. c. 110, s. 12; 52 & 53 Vict. c. 43 (*i*).

Questions have arisen as to whether crew spaces are to be included in the tonnage which is the measure of liability. It seems to be decided that such spaces, when not on the upper deck, must in all cases be included, unless the requirements of the Merchant Shipping Act, 1867 (30 & 31 Vict. c. 124), s. 9, have been complied with (*j*). As these include inspection by the Board of Trade, foreign ships can seldom deduct such spaces. It further seems that the Act of 1867 did not affect the right to deduct crew spaces on the upper deck (*k*), under sects. 21 (3), and 22 (2) of the Merchant Shipping Act, 1854. The provisions of those sections permitting the deduction have, however, been repealed by sect. 2 of the Merchant Shipping (Tonnage) Act, 1889 (*l*), subject, until Aug. 26th, 1894, to certain exceptions. And it seems that now as regards all ships within the operation of that Act (which appears to apply to foreign ships), crew spaces can only be deducted under the Act of 1867.

In the case of foreign ships, if the foreign measurement differs materially from that under the Merchant Shipping

(*g*) *Chartered Mercantile Bank of India, &c.* v. *Netherlands Steam Navigation Co.*, 10 Q. B. D. 521.

(*h*) In St. Lucia, the limit of liability is 18*l.* per ton. The Canadian Act is 43 Vict. c. 29: see *Georgian Bay Transportation Co.* v. *Fisher*, 5 Tupper's Rep., Ontario, 383.

(*i*) 39 & 40 Vict. c. 80, s. 23, does not seem to apply to liability for collision.

(*j*) *The Franconia*, 3 P. D. 164, where *Burrell* v. *Simpson*, 4 Sess. Cas. 4th Ser. 177, was not followed.

(*k*) *The Palermo*, 10 P. D. 21.

(*l*) 52 & 53 Vict. c. 43. Sect. 3 of this Act directs certain deductions in measuring for the purpose of ascertaining register tonnage. In *The Umbilo*, (1891) P. 118, the owner of a steamship was not allowed to make these deductions in limiting his liability.

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Acts, her Majesty is enabled by 52 & 53 Vict. c. 43, to revoke any Order in Council relating to the country of such ship; and the ship will be re-measured under the Merchant Shipping Acts.

Where the ship's tonnage, as shown by her register, had been altered after the collision, and after action for limitation of liability brought, but before judgment in the damage action, it was held that the tonnage to determine the amount of the owner's liability was that shown by the register at the date of the collision (*m*).

The ship's register is not conclusive as to tonnage. If the tonnage is in fact different from that shown by the register, the liability of the owner is measured by the actual and not the register tonnage (*n*).

In the case of a steamship the tonnage, for the purpose of calculating liability, is the gross tonnage, without deduction of engine-room, master's accommodation, or navigation spaces (*o*).

Beneficial owners entitled to limit liability.

The shipowners who are entitled to the benefit of limited liability are beneficial owners as well as registered owners (*p*). It would probably be held that charterers and other persons having a temporary ownership of the vessel are not entitled to the benefit of the Act, but the point has not arisen in any reported case.

"Without their (the owners') actual fault or privity."

The liability of the owner is not limited where he is the actual wrong-doer (*q*); the Act applies only where the collision occurs without the "actual fault or privity" of the owner. The meaning of these words was discussed in *The*

(*m*) *The John M'Intyre*, 6 P. D. 200; and see *The Dione*, 5 Asp. M. L. C. 347.

(*n*) *The Recepta*, 14 P. D. 131; *The Franconia*, *infra*.

(*o*) 25 & 26 Vict. c. 63, s. 54; 52 & 53 Vict. c. 43, s. 3; *The Umbilo*, *supra*. As to deduction of crew spaces, see p. 170, *supra*.

(*p*) *The Spirit of the Ocean*, Br. & L. 336. In *Hughes* v. *Sutherland*, 7 Q. B. D. 160, a person who had contracted to buy a ship was held to be owner within sect. 147 of 17 & 18 Vict. c. 104.

(*q*) See 17 & 18 Vict. c. 104, s. 516. This section seems to apply to 25 & 26 Vict. c. 63, s. 54; see s. 1 of the same Act. In sect. 516 the "master" is mentioned; in sect. 54 "owners" only.

Warkworth (*r*), the facts of which case are stated below (*s*). The effect of the words is to protect the shipowner, not only against the legal consequences of negligence in his servants or agents, but also from any imperfections in the ship which cause collision. An owner navigating his ship with his own hand, or, it seems, under his own orders as master, would not be entitled to the benefit of the Act.

Master part-owner.

If it is intended to make a master who is also part-owner liable beyond the statutory limit, as for a collision caused by his actual fault or privity, he must be sued as master in the first instance (*t*). It is not clear what constitutes fault or privity depriving an owner of the benefit of the statute. Where the master, who was also part-owner, was on board, but not on deck, at the time of the collision, and the ship was properly in charge of the mate and pilot, it was held that there was no fault or privity on the part of the master (*u*).

Co-owners: one actually in fault.

The fact of the master of the wrong-doing ship being a part-owner and personally in fault for the collision will not deprive his co-owners of the benefit of the statute (*v*); but he is himself liable for full damages (*w*). Where the master is a part-owner, it is not necessary for the co-owners, in order to obtain judgment limiting their liability, to prove that the master was not privy to the collision. They are entitled to the usual declaration limiting their liability, with a reservation of the injured person's rights against the master (*x*).

What British ships are entitled to the benefit of the Act.

Under 17 & 18 Vict. c. 104, and the previous Act, 53 Geo. III. c. 159, sea-going ships only were entitled to the

(*r*) 9 P. D. 145.
(*s*) Page 175.
(*t*) *The Volant*, 1 W. Rob. 383.
(*u*) *The Obey*, L. R. 1 A. & E. 102. See *Kidson* v. *McArthur*, 5 Sess. Cas. 4th Ser. 936.
(*v*) *The Spirit of the Ocean*, Br. & L. 336; *The Obey*, *supra*; *Kidson* v. *McArthur*, *supra*; *The Empusa*, 5 P. D. 6; *Wilson* v. *Dickson*, 2 B. & Ald. 2, was a similar decision under 17 & 18 Vict. c. 104.
(*w*) 17 & 18 Vict. c. 104, s. 516. *The Triune*, 3 Hag. Ad. 114, is a decision upon the similar exception in 53 Geo. 3, c. 159.
(*x*) *The Cricket*, 5 Asp. M. L. C. 53.

benefit of limited liability. It seems that any foreign ship and any British ship (*y*), seagoing or otherwise, is entitled to the benefit of the Act now in force; but if she is British, and the law requires her to be registered, she will not be entitled to the benefit of the Act unless she is registered. Craft under fifteen tons employed solely upon the coasts or in rivers of the United Kingdom or some British possession within which the managing owners are resident, and certain fishing and coasting craft on the Newfoundland and neighbouring coasts, are not required to be registered (*z*). Ship must be registered.

Where an unregistered ship was negligently launched from a builder's slip on the Mersey and damaged a vessel afloat, it was held that the liability of her owners (who were British) was not limited by the Act, and they were liable for the whole loss (*a*). But a ship bought by British subjects from Dutch owners, and not yet registered as British, was allowed to limit her liability as a foreign ship (*b*).

Section 54, sub-sect. 2, does not apply to goods transhipped after and in consequence of a collision caused by the fault of the carrying ship, and subsequently lost by the negligence of those on board the ship to which they were transhipped. In such a case the Act affords no protection to the shipowner. *The Bernina*, by her own fault, was in collision with *The Bushire*. Without the assent or knowledge of the cargo-owner, and in order to carry the cargo to its destination, the master of *The Bernina* transhipped his cargo from *The Bernina*, which had been injured in the collision, to *The Brixham* and *Avebury*. These two ships subsequently went ashore, and were lost with their cargoes by the negligence Goods transhipped after collision and lost.

(*y*) As to the meaning of "ship" in the Merchant Shipping Acts, see p. 326, *infra*.

(*z*) 17 & 18 Vict. c. 104, ss. 19, 516; 25 & 26 Vict. c. 63, s. 1. As to sea-fishing craft, 31 & 32 Vict. c. 45.

(*a*) *The Andalusian*, 3 P. D. 182. Cf. *British Columbia Towing and Transport Co.* v. *Sewell*, 9 Duval's Rep. (Canada), 527.

(*b*) *The Brinio*, Ad. Div., Jan. 27th, 1891; 90 L. T. 249.

of those on board. After their loss, *The Bernina* owners instituted an action to limit their liability, and obtained the usual judgment. The cargo-owners made no claim in the limitation action, but instituted an action against *The Bernina* owners for loss of the cargo. It was held that they were not prevented from recovering damages in this action by the judgment in the limitation action (*b*).

Liability limited in contract as well as tort.

The liability of shipowners is limited in respect of damages recoverable in an action upon the contract to carry as well as in respect of a mere tort. So carriers by sea, or partly by sea and partly by land, may limit their liability as against passengers or cargo-owners (*c*).

Liability where two or more collisions.

The owners of every sea-going vessel (*d*) are liable for losses occurring upon separate occasions to the extent of their statutory liability in each case. Where a steamship struck a tug and also the ship to which the tug was passing her tow-line, it was held that the amount for which the steamship was liable was to be calculated as upon one collision and not upon two (*e*).

In a case where a steamship was towing another, and both ran into and damaged a third ship owing to the negligence of the towing ship, it was held that the towing ship was alone liable. The owners of the towing and the towed ship being the same, it was held that their liability was to the extent of 8*l.* per ton upon the tonnage of the towing ship (*f*).

Owners not discharged by

If the wrong-doing ship is sunk in the collision, or sub-

(*b*) *The Bernina*, 12 P. D. 36. The bills of lading of *The Brixham* and *The Avebury* excepted negligence of the master and crew, while those of *The Bernina* did not. It was held this was immaterial. *Morewood* v. *Pollok*, 1 E. & B. 743, is a similar decision upon 26 Geo. 3, c. 86, s. 2.

(*c*) *London & S. W. Rail. Co.* v. *James*, L. R. 8 Ch. 241; *The Normandy*, L. R. 3 A. & E. 152.

(*d*) 17 & 18 Vict. c. 104, s. 506. 25 & 26 Vict. c. 63, s. 54, applies to all foreign and registered British ships.

(*e*) *The Rajah*, L. R. 3 A. & E. 539. Cf. *The Bernina*, 12 P. D. 36; *The Douglas*, 7 P. D. 151. In *The Creadon*, 5 Asp M. C. 585, Butt, J., stated the question to be whether the first collision caused the second.

(*f*) *Union Steamship Co.* v. *Owners of the Aracan, The American, and The Syria*, L. R. 6 P. C. 127.

sequently to it, the owners are not thereby discharged from liability (*g*). sinking of their ship.

The amount recoverable in Board of Trade proceedings under 17 & 18 Vict. c. 104, ss. 507—513, in respect of loss of life or personal injury is limited to 30*l.* for each person hurt or killed (*h*). Amount recoverable for loss of life in proceedings by the Board of Trade.

Lord Campbell's Act (*i*), enabling the representatives of persons killed by negligence to recover damages, is not repealed or affected by the Merchant Shipping Acts, except so far as those Acts limit the extent (*k*) of the shipowner's liability. Combined effect of 25 & 26 Vict. c. 63, s. 54, and Lord Campbell's Act.

It will be observed that the shipowner's liability in respect of injury to persons or goods on board another ship, or to another ship, is limited only where such injury is caused by "the improper navigation" of his own ship; and that his liability as carrier is limited whether the loss arises from improper navigation, or from some other cause. There has been some doubt as to the meaning of the words "improper navigation." In *The Warkworth* the effect of the Act was stated by Brett, M.R., to be that the owner's liability is limited for "all damage wrongfully done by a ship to another whilst it is being navigated, where the wrongful action of the ship by which damage is done is due to the negligence of any person for whom the owner is reponsible" (*l*). "Improper navigation."

In that case the collision was caused by the ship's

(*g*) *The Normandy*, L. R. 3 A. & E. 152; *Brown* v. *Wilkinson*, 15 M. & W. 391. In America, it seems that if the wrong-doing vessel is sunk, the owners are discharged; 2 Parsons on Shipping (ed. 1869), 120—140; 9 U. S. Stat. at Large, 635; *Norwich Steamboat Co.* v. *Wright*, 13 Wall. 104.

(*h*) This enactment is not acted upon in practice. See p. 123, *supra*.

(*i*) 9 & 10 Vict. c. 93; 27 & 28 Vict. c. 95.

(*k*) *Gladholm* v. *Barker*, L. R. 1 Ch. 223; *ibid.* 2 Eq. 598.

(*l*) *Per* Brett, M. R., *The Warkworth*, 9 P. D. 145, 147. As to the meaning of "improper navigation" in an insurance case, see *Canada Shipping Co.* v. *British Shipowners Mutual Protecting Association*, 22 Q. B. D. 727; 23 Q. B. D. 342; *Good* v. *London Steamship Owners' Mutual Protecting Association*, L. R. 6 C. P. 563; *Carmichael* v. *Liverpool Sailing Ship Owners' Mutual Indemnity Association*, 19 Q. B. D. 242.

steam steering-gear failing to act at the critical moment. The gear failed to work owing to a certain pin not being in its place. The pin had worked or fallen out of its socket owing to its not being, as it should have been, a "split" pin. It did not appear by whom the improper pin had been inserted. It was held by the Court of Appeal, affirming the decision of Butt, J., that the collision and loss was caused by improper navigation, without actual fault or privity of the owners, and that their liability was limited by the Act. In the Court of Appeal (*m*) it was held that, the statute being necessary only where there has been negligence for which the owner must be responsible, it must be assumed that the damage done by *The Warkworth* was caused by negligence in fitting the steering-gear, for which negligence the owner was responsible. "Improper navigation means improper navigation by the owner of the ship. Now in the eye of the law the owner does improperly navigate his ship, if, owing to the negligence of some one for whom he is responsible, his ship does damage to another. It is impossible for us to treat 'improper' as equivalent to 'unskilful'; on the contrary, it means 'wrongful.' A person who uses his ship, which is not in a condition to be so employed, does in reality improperly navigate her" (*n*).

An injury done to a vessel in tow by her tug during the performance of the towage contract was held to be caused by "improper navigation" within the meaning of the Act, and the tug-owner's liability was limited (*o*).

It seems that a collision between a ship being launched and another afloat, caused by the fault of those in charge of the launch starting her at a wrong time, is injury by improper navigation within the meaning of the Act (*p*).

(*m*) 9 P. D. 145.

(*n*) *Per* Bowen, L. J., *The Warkworth*, 9 P. D. 146, 148.

(*o*) *Wahlberg* v. *Young*, 24 W. R. 847; 4 Asp. Mar. Law Cas. 27, note; 45 L. J. C. P. 783. *Aliter* in Canada: *British Columbia Towage and Transport Co.* v. *Sewell*, 9 Duval's Rep. 627.

(*p*) See *The Andalusian*, 3 P. D.

Shipowner liable beyond the statutory limit for interest and costs.

The shipowner is liable beyond the sum to which his liability is limited by the statute for interest on the amount of his statutory liability from the date of the collision (*q*). In the case of limited liability this is the rule, whether the ship was earning freight at the time of collision or not (*r*), and whether there are several claims or only one (*s*). And he is liable beyond the statutory amount for the costs of the action (*t*).

Wrong-doer is not purged of his fault by judgment in action limiting his liability.

The owner of a ship sunk by collision who, admitting that the collision was caused by the fault of his own ship, obtains judgment for limitation of his liability, and pays into Court the statutory amount of his liability, does not thereby escape from the legal consequences of his wrongful act in causing the collision, except so far as the Act expressly relieves him. The owner of a ship sunk in the Thames paid into Court the statutory amount of his liability. His ship was raised by the Thames Conservators (who have statutory powers to raise wrecks and reimburse themselves for the expense of raising them by sale of ship and cargo), he undertaking to pay the cost of raising. It was held that the shipowner was bound to hand over cargo on board to its owner, and that the cargo-owner was not liable to pay him anything by way of salvage or general average contribution (*u*).

182, where, however, the point, though raised in argument, was not mentioned in the judgment. See also *per* Brett, M. R., *The Warkworth*, 9 P. D. 145, 147, as to the effect of negligence on shore causing improper navigation on the water.

(*q*) *Straker* v. *Hartland* (1864), 2 H. & N. 570; *The Amalia*, 5 N. R. 164, note; 34 L. J. Ad. 21; *The City of Buenos Ayres* (1871), 1 Asp. Mar. Law Cas. 169; *African Steamship Co.* v. *Swanzy*, 2 K. & J. 660; *General Iron Screw Collier Co.* v. *Schurmanns*, 1 J. & H. 180; *Nixon* v. *Roberts*, 1 J. & H. 739; are decisions under the Act of 1854 to the same effect.

(*r*) *The Northumbria*, L. R. 3 A. & E. 6. As to the justice of the practice compared with that at common law, see *per* Lord Esher, M. R., 13 P. D. 118.

(*s*) *Smith* v. *Kirby*, 1 Q. B. D. 131. It has been stated that the report of this case is incorrect; that it was not a case of collision, but of a ship capsizing through improper stowage.

(*t*) *The Dundee*, 2 Hag. Ad. 137; *Ex parte Rayne*, 1 Q. B. 982, are decisions to this effect under former Acts. A like rule prevails in America; *The Wanata*, 5 Otto, 600.

(*u*) *The Ettrick*, 6 P. D. 127.

Act applies only to injury to or on board craft.

The Act applies only where the injury is to a ship or boat (*x*), or to persons or goods on board a ship. The liability for damage to a pier, wharf, or other object ashore, and for damage to property afloat, other than that mentioned in the Act, is unlimited (*y*).

Liability of shipowner carrying in another man's ship is unlimited; except where the carrier is a railway company.

The liability of a person who contracts to carry persons, animals, or goods by sea, and carries them in a ship not owned by himself, is not limited by the statute. But the liability of a railway company in such a case is limited as regards animals and goods (*z*); and also, it would seem, as regards loss of life or personal injury to passengers; but the words of the Act are somewhat obscure as regards passengers (*a*).

Other cases of unlimited liability.

The liability of owners navigating their own ships, of pilots, harbour and dock masters acting in charge of ships, of partners in a shipping adventure who work but do not own the ship (*b*), seems to be untouched by the Act, and to be unlimited. Whether charterers and others in the position of *pro hâc vice* owners are within the benefit of the Act seems doubtful (*c*). As against the Crown there are no words limiting the liability of the subject (*d*).

Liability for damage to a light-ship.

If a vessel wilfully or negligently injures a light-ship, in addition to her liability for damages, she incurs a penalty of 50*l.* (*e*). Notwithstanding the words of the Act, the liability for damages is probably limited to the statutory amount in this, as in other, cases.

Liability of cargo to arrest not affected by the Act.

The liability of cargo to be arrested in order to compel payment of freight is not affected by the Act (*f*).

Liability of Trinity House pilot.

The liability of a London Trinity House pilot in respect

(*x*) The word "boat" does not occur in paragraphs (1) and (2) of sect. 54.

(*y*) See *River Wear Commissioners* v. *Adamson*, 1 Q. B. D. 546; 2 App. Cas. 743.

(*z*) 34 & 35 Vict. c. 78, s. 12.

(*a*) See *per* Lord Blackburn, *Doolan* v. *Midland Rail. Co.*, 2 App. Cas. 722, 809.

(*b*) As in *Steel* v. *Lester*, 3 C. P. D. 121.

(*c*) The question has never, so far as the writer is aware, arisen.

(*d*) See *The Zoe*, 11 P. D. 72.

(*e*) 17 & 18 Vict. c. 104, s. 414.

(*f*) *The Orpheus*, L. R. 3 A. & E. 308.

of neglect and want of skill is limited to 100*l.*, the amount of the bond required to be executed by him upon his appointment, together with the amount of his pilotage fee (*g*).

Liability for damage by ship owned by single ship company.

The liability for damage caused by a ship owned by a limited liability company incorporated under the Companies Act, 1862, is of course ultimately measured by the value of the assets of the company. Where, as is sometimes the case, the whole assets of the company consist of the ship that does the damage, and she is sunk in the collision, the injured party is without redress.

Combined operation of Act limiting liability and rule as to division of loss.

The effect of the statute limiting owners' liability when it operates in conjunction with the rule as to division of loss is fully discussed in a previous chapter (*h*). It may here be stated shortly that, where both ships are in fault, and the damage to ship A. and to cargo on board her is greater than that to ship B., and B. limits her liability pursuant to the statute, the damages recoverable by A. will be so much of the sum representing B.'s statutory liability as bears to the entire sum the ratio which the difference between the losses on the two ships bears to the aggregate losses of owners of cargo on board A. and other persons entitled to claim against B.; and, further, that B. can recover nothing (*i*).

Insurances against loss where liability is limited are valid.

It is provided (25 & 26 Vict. c. 63, s. 55) that insurances effected against any of the events mentioned in sect. 54, and occurring without actual fault or privity of the owners, shall not be invalid by reason of the nature of the risk. The effect of this clause is not clear; there seems no doubt that such insurances would be valid apart from the Act (*k*).

(*g*) 17 & 18 Vict. c. 104, s. 373.
(*h*) *Supra*, p. 138.
(*i*) *Stoomvaarts Maatschappy Nederlands* v. *Peninsular and Oriental Steamship Navigation Co.*, 7 App. Cas. 795.
(*k*) There seems to have been an idea that such insurances might be invalid for want of interest in the insurer: Hansard's Parl. Deb. vol. 166, p. 2227.

As to the practice in actions for limitation of liability, see below, p. 328.

Priorities of claimants in respect of loss of life and loss of goods.

Where the amount of the fund in Court is insufficient to satisfy in full claims in respect of loss of life and loss of cargo, the former are entitled to the whole of that part of the fund which represents the 7*l.* per ton; and they are entitled to prove against the residue of the fund *pari passu* with the cargo claimants. The latter have no priority of proof against the part of the fund which represents the 8*l.* per ton (*l*).

Proof by the Crown.

The Crown may prove against the fund in Court both by the general law and by 31 & 32 Vict. c. 78, s. 3 (Admiralty Suits Act, 1868) (*m*).

In a recent English case, where there were claims in respect of loss of life as well as loss of property, but all the life claims had been settled out of Court, the shipowner was allowed to limit his liability upon payment into Court of 8*l.* per ton only (*n*).

Liability where some claims settled.

In Scotland it has been held that where the shipowner has settled out of Court some of the claims in respect of a collision for which his ship was in fault, he is entitled, upon a petition for limitation of his liability, to take into account the sums previously paid in respect of such claims; and that the other claimants are not entitled to any more than they would have recovered if none of the claims had been settled (*o*).

Right of bottomry bond-holder on freight, where wrong-doer limits his liability.

Where a ship negligently damages another, and the owners of the latter obtain a judgment limiting their liability under the statute, the holder of a bottomry bond on freight earned by the injured vessel is entitled to share rateably in the amount to which the liability of the wrong-doer is limited (*p*).

(*l*) *The Victoria* (No. 2), 13 P. D. 125. See *Nixon* v. *Roberts*, 1 J. & H. 739; *Leycester* v. *Logan*, 26 L. J. Ch. 306, decided upon 17 & 18 Vict. c. 104, s. 514; *Burrell* v. *Simpson*, 4 Sess. Ca. 4th ser. 177.

(*m*) *The Zoe*, 11 P. D. 72.

(*n*) *The Foscolino*, 5 Asp. M. L. C. 420.

(*o*) *Rankins* v. *Raschen*, 4 Sess. Cas. 4th ser. 725.

(*p*) *The Empusa*, 5 P. D. 6.

NOTE.

Policy of the Law limiting Shipowners' Liability; and Foreign Law upon the Subject.

There has of late years been considerable difference of opinion as to the policy of the law which limits shipowners' liability. The Acts which give effect to that policy have been spoken of as abridging the natural (*q*) or common law (*r*) rights of persons injured by collision, as tyrannical (*s*), and derogating to the extent of injustice from the legal rights of parties (*t*). On the other hand, the Acts in question have been described as valuable (*u*) and necessary for the encouragement of commerce (*x*).

The first view assumes the justice of the law which makes a shipowner, wholly blameless himself, liable for the negligence of his officers and crew. The natural justice of such a law is not immediately apparent; but the experience of mankind, and the prevalence amongst civilized nations of the principle of law represented by the maxim *respondeat superior*, point to its practical efficiency as a check upon negligence. The expediency of so framing the law as to provide the greatest possible security against the carelessness and recklessness of persons to whom is entrusted by others the conduct of a business so likely to do mischief as the navigation of ships is manifest (*y*). But even as matter of expediency it has been questioned whether shipowners or other principals should be liable at all for the negligence of those whom they employ; and it has been said by a distinguished judge that the principle should at any rate not be extended (*z*). However this may be, it would seem that the law *respondeat superior*, if expedient in any case, is eminently so as regards the

(*q*) *Per* Sir R. Phillimore, *The Northumbria*, L. R. 3 A. & E. 6.

(*r*) *Per* Abbott, C. J., *Gale* v. *Laurie*, 5 B. & C. 156, 163. See also *per* Lord Palmerston in the debate in the House of Commons upon 25 & 26 Vict. c. 63, s. 54: Hansard's Parl. Debates, vol. 166, p. 2225.

(*s*) *Per* Brett, L. J., 6 P. D. 136.

(*t*) *Per* Brett, L. J., 4 P. D. 184.

(*u*) *Per* Butt, J., *The Warkworth*, 9 P. D. 20.

(*x*) See *supra*, p. 163.

(*y*) See *per* Lord Bramwell, 7 App. Cas. 826, n.; *per* James, L. J., *The M. Moxham*, 1 P. D. 110.

(*z*) *Per* Jessel, M. R., 9 Q. B. D. 351.

navigation of ships. The lives of all those who navigate the seas, and the safety of the commerce of the world, depends largely upon the attention and carefulness of those whom shipowners place in charge of their ships. Risk of collision has of late years very greatly increased, and will continue to increase. The growth in the number and size of ships, the superseding of sailing ships by steamships, and the rapid speed at which steamships are now run, are circumstances which cannot fail to increase the losses arising from collision. It has been calculated that, other conditions remaining the same, the risk of collision increases with the number of ships in the ratio of ten to one. Statistics show that the percentage of steamships in collision is five times as large as that of sailing ships; and whilst steamships are increasing in number and tonnage the number of sailing ships is stationary, if not decreasing. All these facts seem to point to the expediency of applying to shipowners the same law which in other matters has been found necessary for public safety. So far as the existing law, which limits their liability for the negligent acts of their servants, departs from the wholesome principle *respondeat superior*, it affords a direct encouragement to negligent and reckless navigation.

These considerations do not appear to have weighed with the Legislature, either when the original Act of Geo. III., or when the subsequent Merchant Shipping Acts were passed for the relief of shipowners. The history of those Acts shows that they originated in a policy of protection, of which the necessity or expediency at the present day may well be doubted.

It may, however, be thought that it is necessary to maintain the principle of limited liability for the relief of British shipowners so long as that rule is enforced by laws of other maritime nations. It appears that shipowners' liability is limited by the municipal laws of most, if not all, foreign countries. The state of foreign law upon the subject is as follows:—

The law as to limitation of liability in America.

In the United States of America owners are not liable in the Federal Courts for loss or damage beyond the amount of their interest in the ship and freight at the time of the collision.

But there is no limitation of liability for damage by a vessel wholly engaged in inland navigation: *The War Eagle*, 6 Bissel, 364. If the wrong-doing ship is herself sunk, it seems that the owners are altogether discharged: 2 Parsons on Shipping (ed. 1869) 120, *seq.*; 9 U. S. Stat. at Large, 635; *Norwich Steamboat Co.* v. *Wright*, 13 Wall. 104 (in this country the loss of their own ship never discharged the owners: *Brown* v. *Wilkinson*, 15 M. & W. 391); and the limit of liability is the value of the ship after collision: *Norwich and New York Transportation Co.*, 17 Blatchf. 221. But certain formalities must be gone through, and the ship must be surrendered, or the owners will not be entitled to the benefit of the Act of Congress limiting their liability: see *The Jos. W. Dyer* v. *National Steamship Co.*, 14 Blatchf. 483. In some of the State Courts it has been doubted whether the owner's liability is limited; but it appears that where one of the ships is foreign the Federal Courts, and not the State Courts, have jurisdiction, and that the foreign ship has the benefit of the Act of Congress; see a letter from Mr. Thornton to Lord Tenterden, of 25th Nov., 1872.

Continental law.

Upon the Continent of Europe the rule that abandonment of the ship discharges the owners is almost, if not quite, universal. Art. 216 of the French Code de Commerce is as follows:—

France.

"Tout propriétaire de navire est civilement responsable des faits du capitaine, et tenu des engagements contractés par ce dernier pour ce qui est relatif au navire et à l'expédition. Il peut dans tous les cas s'affranchir des obligations ci-dessus par l'abandon du navire et du fret. Toutefois la faculté de faire abandon n'est point accordée a celui qui est en même temps capitaine et propriétaire ou co-propriétaire du navire. Lorsque le capitaine ne sera que co-propriétaire, il ne sera responsable des engagements contractés par lui, pour ce qui est relatif au navire et à l'expédition, que dans la proportion de son intérêt."

As to the history of this article, see *Lloyd* v. *Guibert*, L. R. 1 Q. B. 115; 6 B. & S. 100; and per Dr. Lushington, *The Mary Ann*, L. R. 1 A. & E. 8, 11.

The law by which the shipowner's liability is limited to the value of the ship and freight has no application in the case of a collision between craft engaged in inland navigation. A distinction is drawn between collisions "maritimes" and "non-maritimes." In the one case the owner's liability is limited, in the other not:—"comme dans l'un, c'est la chose, autrement dit le navire qui répond plutôt le dommage, et dans l'autre, la personne;" Jurisprudence et Doctrine en Matière d'Abordage, par M. Sibille, pp. 7, 8.

Germany, Holland, Belgium, Russia, Portugal, Spain, Italy, Egypt.

Arts. 451, 452 of the German Commercial Code; Art. 321 of that of Holland; Art. 7 of the Belgian Code; Art. 491 of the Italian; Art. 649 of the Russian (*a*); Art. 587 of the Spanish Code; and Art. 30 of the Egyptian Code de Commerce Maritime, are similar in effect to the article of the French Code cited above. The corresponding Article (492) of the new Portuguese Code seems only to limit the owner's liability in respect of obligations arising out of contract: a doubt might be suggested as to whether this is not the effect of the Italian provision also (*b*).

(*a*) The writer has been unable to examine the latest Russian code; but it is believed to be to the same effect as that referred to in the text.

(*b*) As to some recent foreign codes, see p. 160, note (*a*), *supra*.

CHAPTER VIII.

TUG AND TOW.

WHERE one ship is in tow of another, the two ships are, for some purposes, by intendment of law, regarded as one, the command or governing power being with the tow, and the motive power with the tug (*a*). For some purposes tug and tow are treated as one ship.

Thus, for the purposes of the Regulations for preventing collision, the tug and her tow are treated as one ship, and that a steam or sailing ship according as the towing ship is under steam or not (*b*). But it is obvious that a tug with a ship in tow has not the same facility of movement as if she were unincumbered. She is not, in anything like the same degree, mistress of her own movements. She cannot, by stopping or reversing her engines, at once stop or back the ship in tow. In taking measures to avoid a third vessel she has to consider her tow; and a step that would be right, and take her clear, if she were unincumbered, may bring about a collision between her tow and the ship which she herself has avoided (*c*). Although, therefore, it is the duty of a tug with a ship in tow to comply, so far as is possible, with the Regulations for preventing collisions, it is also the duty of a third ship For the purposes of the Regulations.

(*a*) *The Cleadon*, 14 Moo. P. C. C. 97; *The American* and *The Syria*, L. R. 6 P. C. 127, 132.

(*b*) *The Warrior*, L. R. 3 A. & D. 553; *The American* and *The Syria*, *ubi supra*. The same has been held in America: *New York, &c. Co.* v. *Philadelphia, &c. Co.*, 22 How. 461; *The Ivanhoe* v. *The Martha M. Heath*, 7 Bened. 213; *The Civilta* and *The Restless*, 6 Bened. 309; 13 Otto, 699; *The Farewell*, 8 Quebec L. R. 87. There has been no decision as to a sailing ship towing another, but there can be little doubt that the law is as stated in the text.

(*c*) See *The Arthur Gordon* and *The Independence*, Lush. 270; *The Kingston-by-the-Sea*, 3 W. Rob. 152.

to make allowance for the incumbered and comparatively disabled state of a tug, and to take additional care in approaching her (*d*).

Whether tug and tow are one ship, so that one is affected by the fault of the other.

The principle that the tug and her tow are in law regarded as one ship has been applied in Admiralty so as to make one of them liable for a collision with a third ship caused by the fault of the other. Unless the actual wrongdoer in these cases is the servant or agent of the owner of the ship sued, the condemnation in Admiralty of the ship sued appears to conflict with the principle laid down in some of the cases (*e*), that the responsibility of the owner at law and the liability of the ship in Admiralty are always concurrent. We propose, therefore, to consider in some detail the respective liabilities at law of the owners of the tug and of the owners of the tow, and in Admiralty of the tug and of the tow, where there is a collision between the tug and a third ship, or between the tow and a third ship.

The tug is the servant of the tow; meaning of the expression.

It is a term of the ordinary towage contract that, as regards the conduct and navigation of the two ships, the tug and those on board her shall obey the orders of those on board the tow (*f*). This relationship between the two ships is expressed by the saying, to be met with in some of the cases, "that the tug is the servant or in the service of the tow" (*g*). This expression has led to the tow being held in Admiralty responsible for the fault of those on board the tug; at least, where such fault leads to a collision between the tow and a third ship.

Tow liable in Admiralty for the fault of her tug.

In *The Ticonderoga* (*h*), a vessel in tow of a steamship, which by the terms of her charter-party she was bound to

(*d*) *The American* and *The Syria* L. R. 6 P. C. 127; *The La Plata*, Swab. 220, 298.

(*e*) A principle which has not always been adhered to: *supra*, p. 93.

(*f*) Sec *infra*, p. 197.

(*g*) See *per* Sir R. Phillimore in *The Mary*, 5 P. D. 14, 16; *The Sinquasi*, 5 P. D. 244; *per* Sir R. Collier in *The American* and *The Syria*, L. R. 6 P. C. 127, 132.

(*h*) Swab. 215.

employ, struck and injured a third ship. The collision was caused by the fault of those on board the steamship. It was held by Dr. Lushington that the tow was liable in Admiralty. "In cases of one vessel coming into collision with another, and the vessel proceeded against having been in charge of a steamer, there can be no doubt whatever that the vessel which has the steamer in her employ is responsible both for her own acts and those of the steamer" (*i*).

A barque in tow of a tug was approaching the entrance of the Regent's Canal Basin. The tug, without orders from the barque (which was in charge of a compulsory pilot), improperly altered her course, and thereby caused the barque to strike and injure the pier head. It was held by Sir R. Phillimore that the barque and her owners were liable: "The tug was the servant of *The Sinquasi* (the barque), and *The Sinquasi* is responsible for what the tug did" (*k*). It seems to have been held, also, that under the special circumstances of the case it was the duty of the tug to alter her course without waiting for orders from the tow.

In *The Bianca* (*l*) it seems to have been assumed that the ship proceeded against, the tow, was responsible for the fault of those on board the tug. And in *The American* and *The Syria* Sir R. Collier stated the law to be that "the tug is in the service of the tow; the tow is answerable for the negligence of her servant, and is for some purposes identified with her" (*m*).

It seems clear, therefore, that in Admiralty the tow is liable for a collision between herself and a third ship by the fault of those on board the tug; and further, that her liability is independent of the question whether those on board the tug are the servants of the owners of the tow, in the sense that the latter would be liable at law for the

(*i*) *Aliter* in Canada, *The William*, 4 Quebec L. R. 306.
(*k*) *The Sinquasi*, 5 P. D. 241.
(*l*) 8 P. D. 91.
(*m*) L. R. 6 P. C. 127, 132.

negligence of the former. There seems reason to think that the habit of personifying the ship, which, as pointed out above, has produced confusion in other cases, has led to the condemnation in Admiralty of a ship in tow for the fault of those on board her tug, without sufficient consideration of the question whether the wrong-doer is a person for whose acts the owner of the ship sued is liable at law. The *ratio decidendi* in *The Ticonderoga*, *The Sinquasi*, and other cases above cited, seems to have been as follows: the collision was caused by the fault of the tug; the tug is the servant of the tow; therefore the tow is liable for the collision (*n*). The soundness of this reasoning appears to depend upon the assumption that the ship with which the wrong-doer does the wrong, or on board which he happens to be when the wrong is done, is in Admiralty herself a wrong-doer—a proposition which, at the present day, there would be difficulty in establishing.

Whether tow liable for collision between tug and third ship by fault of tug.

Whether the doctrine that the tug is the servant of the tow, so as to make the latter liable for the negligence of the former, would be carried so far as to make her (the tow) liable in Admiralty for a collision between the tug and a third ship, has not been decided. It has been held that a ship may be sued and condemned in Admiralty for negligence on her part which causes a collision between two others (*o*); but it seems doubtful whether a tow, free from fault as regards those on board her, could be condemned for a collision between her tug and a third ship caused by the fault of those on board the tug, who were not in the employment of the owners of the tow.

Collision between tug and third ship by fault of tug.

In the cases above considered the collision was between the tow and a third ship, and the action was against the tow. In the following case the collision was between the tug and a third ship.

(*n*) See also *per* Sir R. Collier in *The American* and *The Syria*, L. R. 6 P.C. 127, 132; *The Mary Hounsell*, 4 P. D. 204; *supra*, p. 57.

(*o*) See *The Sisters*, 1 P. D. 117, and cases cited *supra*, p. 27.

A tug was towing a ship in charge of a compulsory pilot. The tug struck and injured a third ship. It was held that, assuming the collision was caused entirely by the fault of the pilot of the tow in wrongly directing the tug's course, still the tug was liable for the injury to the third ship (*p*). It was further held, the pilot being compulsorily in charge of the tow, that the exemption from liability which usually accompanies compulsory pilotage did not protect the tug.

The American and *The Syria*.

It remains to mention the case of *The American* and *The Syria* (*q*), which was not a case of ordinary towage, and in which different principles were applicable. *The Syria* and *The American* belonged to the same owners. *The Syria* was disabled in a foreign port. The master of *The American* took her in tow in order to bring her to England. On the passage home, by the fault of those on board *The American*, a collision occurred between *The American* and a third ship, *The Aracan*. *The Syria* also struck and injured *The Aracan*. It was held that *The American* was liable for the whole of the damage, and that *The Syria* was not liable at all. *The American* was not employed by the master of *The Syria*, but took her in tow partly for the benefit of the common owners, and partly to obtain salvage from the owners of cargo on board *The Syria*. It was held that, the case not being one of ordinary towage, *The Syria* was not liable for the fault of *The American*. But it seems to have been assumed by the Court that, if the case had been one of ordinary towage, *The Syria* would have been liable. It had been held by Sir R. Phillimore in the Court below that *The American* and *The Syria* were in law one ship, and that therefore *The Syria* was liable in Admiralty for the fault of *The American*. This decision was reversed by the Privy Council upon the ground above stated, that

(*p*) *The Mary*, 5 P. D. 14. It should be stated that the decision upon this point was unnecessary, the tug being herself in fault.

(*q*) L. R. 4 A. & E. 226; on app. *ib.* 6 P. C. 127.

the general rule did not apply, because in the present case the governing power was with the towing ship and not with the tow.

The principle involved in the last-mentioned decision was applied in the recent case of *The Quickstep* (*r*), where a Divisional Court of the Admiralty Division held that a barge which was towed into collision by her tug was free from blame, on the ground that the governing power was solely in the tug, and it was said to be a question in each case whether the tug or the tow is responsible for the navigation.

Liability at law of tug-owners and of tow-owners.

We propose now to consider the liability at law of the owners of the tug and of the tow respectively for a collision between the tug or the tow and a third ship. First, where the collision is between the tow and a third ship by the fault of those on board the tow. In this case there is no difficulty: the tow-owners are liable for the damage caused by the negligence of their servants, the crew of the tow. And it seems equally clear that the tug-owners are not liable. They are in no sense masters or employers of the crew of the tow; and the doctrine that tug and tow are in law one ship can have no application in such a case.

Collision between tow and third ship by fault of tow.

Between tow and third ship by fault of tug.

Secondly, the case of a collision between the tow and a third ship by the fault of those on board the tug. It is possible that in this case the crew of the tug, though the general servants of the owners of the tug, might be held to be also the servants of the owners of the tow, so as to make the latter liable for their negligent acts in the course of the towage (*s*). There has been no decision upon the point, and there are considerable difficulties in holding the

(*r*) 15 P. D. 196.

(*s*) See *Rourke* v. *White Moss Colliery Co.*, 1 C. P. D. 556; 2 C. P. D. 205; *Dalyell* v. *Tyrer*, E. B. & E. 899, where it seems to have been thought that the charterers as well as the owners might be liable: *Johnson* v. *Lindsay*, 23 Q. B. D. 508; *Jones* v. *Corporation of Liverpool*, 14 Q. B. D. 890.

tow-owners liable in such a case. The liability of the tug-owners seems clear.

Between tug or tow and third ship by fault of tow giving wrong orders to tug.

Thirdly, a collision between the tug or the tow and a third ship by the fault of those in charge of the tow in wrongly directing the course of the tug. Here the tug-owners would be liable as employers of the actual wrong-doer, the helmsman of the tug, and not the less so because their servant is bound by the towage contract to obey those on board the tow (*t*). And it is conceived that the tow-owners would also be liable; for it was the wrong order given by their servant that caused the collision. If no order were given by those on board the tow, the owners of the tug would be liable, since it is the duty of those on board the tug to keep both tug and tow clear of other ships without waiting for orders from the tow (*u*). And it seems that the owners of the tow might also be liable in this case. Assuming that those on board the tug are not the servants or agents of the owners of the ship in tow, it would perhaps be held that the omission to direct the tug to keep clear of the third ship is negligence making the owner of the tow liable for the damage to the third ship (*x*).

Where tow gives no order to tug.

A strong opinion to this effect was expressed by Sir J. Hannen in *The Niobe* (*y*). The ship *Niobe* was being towed from Greenock to Cardiff by the tug *Flying Serpent*. It was a sea towage, and the scope of tow rope was 100 fathoms. The steamship *Valetta*, on a N.E. by E. course, sighted the lights of *The Flying Serpent* three miles off on her port bow. *The Valetta* kept her course. *The Flying Serpent*, on S.S.W. course, struck *The Valetta* on her port bow with her stem and starboard bow. There was a bad look-out on *The Niobe*, and in consequence her helm was not ported until it was too late to avoid collision. The

(*t*) See *Fenton* v. *Dublin Steam Packet Co.*, 8 A. & E. 835.
(*u*) *The Sinquasi*, 5 P. D. 241.
(*x*) See *The Energy*, L. R. 3 A. & E. 48, *infra*, p. 202.
(*y*) 13 P. D. 55.

Court was advised by the assessors, and held, that it was the duty of *The Niobe* to have ported before she did, and that by so doing she would either have girted the tug, and so forcibly altered her course, or would have attracted the tug's attention, warned her of the danger, and caused her to alter her helm. The fault of the tug was not contested, her owners admitting liability. Under these circumstances it was not necessary to decide the question of law as to the liability of the tow-owner for the negligence of those on board the tug; but Sir J. Hannen expressed the opinion that where the collision would not have occurred if those on board the tow had not been negligent in directing the course of the tug, the tow-owners would be liable for a collision between the tug and a third ship; and further, that their liability arises not from the existence of any relationship of master and servant between them and the crew of the tug, but because of the control which the towage contract gives them over those on board the tug. The case of *Quarman* v. *Burnett* (z), said Sir J. Hannen, was not an authority against the liability of the tow-owners in such a case, their liability being similar to that of the passenger in a jobbed carriage, who takes upon himself to direct the driver.

Between tug and third ship by fault of tug and tow.

In a collision between the tug and a third ship, caused partly by the fault of those on board the tug, and partly by the fault of those on board the tow, the tow-owner is liable (*a*).

Sudden movement of tug causing collision.

In *The Niobe* (*supra*) it was proved that the collision would not have happened if there had been a proper look-out on board the tow, and that the tow could have controlled the movements of the tug. But if the movement of the tug is so sudden that those on board the tow could not have controlled it, the tow-owner (it was said by Sir J. Hannen in *The Niobe*) would not be liable. In *The Storm-*

(z) 6 M. & W. 499.

(*a*) *The Niobe*, 13 P. D. 55.

cock (*b*), where the tug on a safe course suddenly departed from it and thereby caused a collision between the tow and a third ship, it was held that the tug was liable to indemnify the tow for damages paid by the latter for the collision. The dictum of Sir J. Hannen as to the non-liability of tow-owner for sudden manœuvres of the tug is not easily reconciled with the doctrine that "the tug is the servant of the tow," or with the decision in *The Sinquasi* (*c*).

Liability where the command is with the tug.

The doctrine that the tug is the servant of the tow is inapplicable where not only the motive power, but also the command, is with the tug. Thus where the towing ship is a salvor, and the command of both ships has been expressly or impliedly handed over to those in charge of her; or where she has picked up a derelict, or is towing a fleet of dumb barges, it would seem that the towing ship and her owners are alone liable for damage done by herself or her tow; and this was the effect of the decisions in *The American* and *The Syria*, and in *The Quickstep*, mentioned above (*d*).

Compulsory pilot in charge of tow.

Where a ship in tow is in charge of a compulsory pilot, there is doubt whether the tug and her owners are free from liability for a collision between a third ship and the tug or her tow caused entirely by the fault of the pilot. The ship in tow and her owners are clearly free from liability in such a case (*e*). In a case decided under 6 Geo. IV. c. 125, Dr. Lushington said:—"If a licensed pilot is on board (a vessel in tow), and his orders are obeyed, the owners are absolved from responsibility for damage occasioned by such vessel. But if the pilot was to be deprived of his authority, and the (tug) steamer was not bound to follow his directions, and a collision ensued, the (tug) steamer would be the agent of the owners of the vessel in tow, and the owners of that vessel would no

(*b*) 4 Asp. M. L. C. 410.
(*c*) 5 P. D. 241.
(*d*) *Supra*, p. 190.
(*e*) *The Ocean Wave*, L. R. 3 P. C. 205.

longer be protected by the Act of Parliament" (*f*). These observations seem applicable at the present day as regards the liability of the ship in tow when a pilot is on board and in charge by compulsion of law. And there would seem to be difficulty in holding the owners of a tug to be liable for acts of her crew for which the compulsory pilot is responsible, and which are negligent only so far as they are in pursuance of his orders. In *The Mary*, however, it was considered by Sir R. Phillimore that in Admiralty the tug would be liable in such a case (*g*); but the point was not expressly decided, as the tug was in fact guilty of contributory negligence. It was held by Dr. Lushington in several cases that the tug is free from liability in such a case (*h*); and although these decisions were not under the existing Pilotage Act, the reasons upon which they were founded seem to be equally cogent at the present day as regards the non-liability of the tug-owners. Where there is contributory negligence on the part of the tug-owner or the tow-owner, compulsory pilotage will, of course, be no defence (*i*).

Can tow-owner by contract with tug-owner free the tow from liability to third parties?

The question whether the owner of a tow can by contracting with the tug-owner that he shall have entire control of the tow discharge himself from liability to a third ship for a collision between the tow and the third ship has not been decided. Having regard to the decisions (*k*) as to the liability in Admiralty of chartered and other ships out of their owners' possession, it is possible that the tow may be held liable in Admiralty in such cases, though, as it seems, her owners are not liable at law.

(*f*) *The Duke of Sussex*, 1 W. Rob. 270, 273.

(*g*) 5 P. D. 14.

(*h*) *The Duke of Sussex*, 1 W. Rob. 270, 273; *The Christina*, 3 W. Rob. 27; and see *The Ocean Wave*, L. R. 3 P. C. 205; *The Gipsey King*, 5 Not. of Cas. 282, 288.

(*i*) As in *The Belgic*, 2 P. D. 57, where the tug had insufficient power.

(*k*) *The Lemington*, *The Druid*, *The Tasmania*, *supra*, pp. 89—93. See further on this subject a pamphlet entitled "Maritime Lien," by the Hon. J. Mansfield, London, Stevens & Sons, 1889.

The practice of tug-owners, however, is not to enlarge, but to minimise their responsibilities, and they frequently protect themselves by a special contract against the liabilities which the ordinary towage contract throws upon them. The terms of the towage contract in the case of *The Tasmania* are, it is believed, those upon which much towage is done; and under such a contract the tug-owner stipulates that he shall not be liable for damage to the tow even by his own servant's negligence, and also for an indemnity against damage done by the tow.

Responsibility for employment of tug.

The responsibility for the employment of a tug, in ordinary cases, rests with the master, whether the ship is in charge of a pilot or not. But if the employment of a tug is necessary for the safety of the ship, it is at least doubtful whether the master would be justified in refusing to employ a tug upon the pilot's advising him to do so (*l*). If a vessel in tow is under way when she ought not to be moving, as in a dense fog or in a crowded dock at night-time, the presence on board of a compulsory pilot would not exempt the owners from liability for damage done by her (*m*).

American law as to tug and tow.

The decisions of the Courts of the United States of America as to the duties and liabilities of a tug and her tow are very numerous. They are not altogether consistent with the English cases upon the subject. The different character of much of the towage service in American waters, where large fleets of barges are constantly being navigated in charge of a single tug, probably accounts for the somewhat different view of the law taken by the American Courts. The law as to the liability of tow and tug has been thus stated by the Supreme Court: "Cases arise, undoubtedly, where both the tow and tug are jointly liable for the consequences of a collision; as

(*l*) *The Julia*, Lush. 224. Cf. *The Agamemnon*, 1 Quebec L. R. 333 (duty of ship at anchor driving to employ tug); *The Arran*, 9 Quebec L. R. 278 (cable parting).

(*m*) See *The Borussia*, Swab. 94.

American law.

where those in charge of the respective vessels jointly participate in their control and management, and the master and crew of both vessels are either deficient in skill, omit to take due care, or are guilty of negligence in their navigation. Other cases may well be imagined where the tow alone would be responsible; as where the tug is employed by the master or owners of the tow as the mere motive power to propel their vessel from one point to another, and both vessels are exclusively under the control and direction and management of the master and crew of the tow. . . . . But whenever the tug under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel which, for the time being, has neither her master or crew on board, from one point to another over waters where such accessory power is necessarily or usually employed, she must be held responsible for the proper navigation of both vessels. . . . . Assuming that the tug is a suitable vessel, properly manned and equipped for the undertaking, so that no degree of negligence can attach to the owners of the tow on the ground that the motive power employed by them was in an unseaworthy condition, the tow, under the circumstances supposed, is no more responsible for the collision than so much freight (*n*). And it is not perceived that it can make any difference in that behalf that a part or even the whole officers and crew of the tow are on board, provided it clearly appears that the tug was a seaworthy vessel properly manned and equipped for the enterprise" (*o*).

In accordance with the principles here laid down, in some cases both tug and tow (*p*), in others the tug

(*n*) So in *The Alabama* and *The Gamecock*, 2 Otto, 695, it was said by the Supreme Court that a ship in tow bears the same relation to the collision as cargo on board either of the ships.

(*o*) *Sturges* v. *Boyer*, 24 How. 110.

(*p*) *The Coleman* and *The Foster*, Brown, Adm. 456; *The Maybey* and *The Cooper*, 14 Wall. 204.

alone (*q*), or the tow alone (*r*), have in America been held liable for damage done to other ships by tug or tow. Where both the tug and her tow have been sued and held liable in Admiralty, the decree has gone against each of them for half the damages, with power for the plaintiff to have recourse against either of them for the balance, in case of failure of the other to pay her full moiety of the damages (*s*). The English Court has recently refused to adopt this practice (*ss*).

It has been held in America that a tug with a fleet of barges or canal boats in tow, though she is not, like a common carrier, liable as insurer of the cargo on board her tow (*t*), is generally liable for damage to the craft in tow or the cargo on board them, and also for damage to third ships by the tow (*u*).

The contract of towage; its terms and performance.

As stated above (*v*), it is an implied term in the ordinary contract of towage that the tug shall implicitly obey the orders of the ship in tow (*x*). If no orders are given by the latter, it is the duty of the tug to take such a course as will carry herself and her tow clear of collision and other dangers (*y*); but it seems to have been held in the Privy

(*q*) *Smith* v. *The Creole* and *The Sampson*, 2 Wall. C. C. Rep. 485. Cf. *The William*, 4 Quebec L. R. 306.

(*r*) *The Cambridge*, *The Underhill*, and *The Chase*, 4 Boned. 366; *Cushing* v. *The Owners of The John Fraser*, 21 How. 184; *The Clarita*, and *The Clara*, 23 Wall. 1; and *The Galatea*, 2 Otto, 439. In *The R. B. Forbes*, 1 Sprague, 328, and *The Rescue*, 2 Sprague, 16, the tug was held liable for collision between a tow, lashed alongside, and a third ship.

(*s*) *The Virginia Ehrman* and *The Agnese*, 7 Otto, 309; *The City of Hartford* and *The Unit*, 7 Otto, 323; *The Atlas*, 3 Otto, 302; *The Juniata*, *ibid.* 337; *The Sterling* and *The Equator*, 16 Otto, 647.

(*ss*) *The Avon* and *The Thomas Jolliffe*, (1891) P. 7.

(*t*) *The Stranger*, Brown, Ad. 281; *The Margaret*, 4 Otto, 494.

(*u*) See 1 Parsons on Shipping, ed. 1869, 536; *The Quickstep*, 9 Wall. 665. As to the duty of the tug with regard to the making up and navigation of the tow, see *infra*, p. 200. As to the law in France with regard to the respective liabilities of tug and tow, see Caumont, Abordage Nautique, §§ 216 *seq.*

(*v*) Page 186.

(*x*) *The Christina*, 3 W. Rob. 27; 6 Moo. P. C. C. 371; *Smith* v. *St. Lawrence Tow Boat Co.*, L. R. 5 P. C. 308; *The Julia*, Lush. 224; *Spaight* v. *Tedcastle*, *infra*; *The Isca*, 12 P. D. 34; *The Niobe*, 13 P. D. 55.

(*y*) *Spaight* v. *Tedcastle*, 6 App. Cas. 217; *The Sinquasi*, 5 P. D. 241; *The Civilta* and *The Restless*, 13 Otto, 699.

Council (*z*) that it was not a breach of duty for the tug to pursue a course which, though imprudent, the pilot of the tow acquiesced in.

Danger of double command and divided responsibility.

The reason for the rule that, under ordinary circumstances, the tug must obey the orders of the ship in tow is, that there may be no divided responsibility or double command. It is considered necessary for the safety of both that they should be under the supreme command of one person. "I am well aware," said Dr. Lushington, "that mischief may in some instances arise from pilots (in charge of the tow) having entire control over steam tugs, and giving directions contrary to the judgment and experience of the masters of steam tugs, conversant as they are with every part of the waters in which they are employed. At the same time, I feel still greater difficulties would be occasioned by two conflicting and independent authorities being exercised in the navigation of one and the same vessel" (*a*).

Duty of tug in crowded waters.

In crowded waters, with ships passing and repassing in all directions, it is obvious that frequent and sudden alterations in the course of the tug must be made to clear passing craft. Under such circumstances it is the duty of the tug to keep herself and her tow clear of other vessels without waiting for orders from her tow (*b*).

Duty of tug to warn tow of danger.

Although it is the duty of the tug to obey the orders from the ship in tow, her duty does not end here. It has been already stated that, in the absence of orders from the tow, she is bound to show proper care and skill in the course she takes and in the performance of the towage

(*z*) *Smith* v. *St. Lawrence Tow Boat Co.*, L. R. 5 P. C. 308; see *per* Lord Blackburn, *Spaight* v. *Tedcastle*, 6 App. Cas. 217, 222. In America considerable responsibility is thrown on the tug. Thus it has been held that it is the duty of the tug to be acquainted with the waters she navigates, and to keep her tow clear of local dangers: *The Lady Pike*, 21 Wall. 1; *The Webb*, 14 Wall. 406; *The Margaret*, 4 Otto, 494.

(*a*) *The Christina*, 3 W. Rob. 27, 33; in *The Duke of Sussex*, 1 W. Rob. 270, the decision was to the same effect, and upon similar grounds.

(*b*) See *The Sinquasi*, 5 P. D. 241, *supra*, p. 187; *The Isca*, 12 P. D. 34; *The India*, Ad. Div. 7th Dec. 1886.

service. And if the orders she gets from the ship in tow are manifestly wrong, it is her duty, even if the orders are given by a pilot in charge of the tow, to warn the tow of her danger. "The vessel and the lives of the crew are not to be risked because there is a law which imposes the ordinary responsibility upon one individual. . . . . It is not for the steamer (the tug), knowing the danger, to maintain, as it were, a sulky silence, and make herself, as it were, instrumental in the destruction of life and property" (*c*). But except in case of manifest incapacity or error on the part of the pilot, it would seem that it is not the duty of the tug to exercise a discretion as to carrying out the pilot's orders; nor would she be justified in disobeying them, although there may be risk of collision in carrying them out.

Tow damaged: effect on towage contract.

If, during the performance of a towage contract, the ship in tow is injured by collision, and has to stop and repair her damage, and the tug stands by whilst the repairs are being executed, and then completes the towage, the tug cannot recover in an action upon the towage contract additional remuneration for delay beyond the sum agreed to be paid for towage (*d*).

Where the tug, in performance of a towage or salvage service, negligently damages her tow by collision, or in any other way, she forfeits her right to towage or salvage remuneration (*e*).

Mutual duties of tug and tow under the towage contract.

Duties of the tug.

The following points have been decided with reference to the mutual duties under the towage contract of tug and tow. The tug must be sufficient as regards seaworthiness, equipment and power to perform the service she under-

(*c*) *The Duke of Manchester*, 4 Not. of Cas. 575, 582; 5 Not. of Cas. 470. The tug was, in this case, performing a salvage service. As to the duty of the tow to warn the tug of danger, see *The Niobe*, *supra*, p. 192.

(*d*) *The Hjemmett*, 4 Asp. Mar. Law Cas. 274; 5 P. D. 227.

(*e*) *The Christina*, 3 W. Rob. 27, as to the towage contract not being performed: *The Duke of Manchester*, *ubi supra*, as to salvage. But see *The Sweepstakes*, Brown, Ad. 509, where a set-off was allowed.

takes (*f*), and there is an implied warranty by her owner that she is so (*g*). If she supplies the tow-rope, she is responsible for its sufficiency (*h*). She must show ordinary skill, care, and diligence in performing the towage service (*i*). She must generally obey the orders of the tow as regards course, speed, alterations of the helm, stopping and going ahead (*k*), and also orders with reference to the tow-rope, its scope, making it fast and casting it off (*l*). It is her duty to keep a vigilant look-out, both on her own account and on account of her tow, since the latter cannot always see ahead (*m*). If she is compelled to cast off her tow, to save herself from collision, or for any other reason, it is her duty to pick up her tow again as quickly as possible (*n*).

In America it has been held, in the case of a tug with a number of barges and river craft in tow, that it is the duty of the tug to arrange and make up her tow; to see that the tow lines are sufficient and properly made fast; and generally to superintend and navigate the tow, so that other ships are not injured by it, and so that the barges do not injure each other (*o*).

Duties of the tow.

The duty of the ship in tow is to direct the course, and generally to give orders as to the conduct and navigation of the two ships (*p*); to keep a good look-out, and, in case of danger, to attract the attention of the tug by hailing or in some other manner, so as to warn her of the danger (*q*);

(*f*) *The United Service*, 8 P. D. 56; 9 P. D. 3; *The Minnehaha*, Lush. 345.

(*g*) *The Undaunted*, 11 P. D. 46.

(*h*) *The Robert Dixon*, 4 P. D. 121; 5 P. D. 54; *The Echo*, 7 Bened. 70; *The A. R. Wetmore* and *The Epsilon*, 5 Bened. 147 (American).

(*i*) *The Julia*, Lush. 224; *British Columbia Towage and Transport Co.* v. *Sewell*, 9 Duval's Rep. (Canada) 527.

(*k*) See cases cited above, pp. 186, 197 *seq.*

(*l*) *The Energy*, L. R. 3 A. & E. 48; *The Julia*, Lush. 224.

(*m*) *The Jane Bacon*, 27 W. R. 35.

(*n*) *The Anapolis* and *The Golden Light*, Lush. 355.

(*o*) *The Quickstep*, 9 Wall. 665; *The Stranger*, Brown, Ad. 281; *The Cayuga*, 16 Wall. 177; *The Francis King*, 7 Bened. 11; *The Syracuse*, 12 Wall. 167.

(*p*) See the cases cited, *supra*, pp. 186, 197 *seq.*

(*q*) *The Niobe*, 13 P. D. 55. It was here held that this was a duty of the tow as regards a third ship with which she was in collision: *supra*, p. 192.

to follow in the wake of the tug as nearly as possible (*r*); to have proper lights exhibited (*s*); in frequented waters to have the tow-rope so made fast that it can be readily cast off (*t*); and to give the order to slip when necessary (*u*).

In *The Jane Bacon* (*x*), a ship in tow was held liable for the capsizing of a smack by the tow-rope, which caught her mast. The tug altered her helm and passed on one side of the smack; the tow, instead of following in the tug's wake, altered her helm in the opposite direction and endeavoured to pass on the other side of the smack. The tow-rope, being thus spread, caught the smack's mast and capsized her.

Mutual rights and liabilities of tug and tow in case of collision: (1) between themselves, (2) between one of them and a third ship.

The mutual rights and liabilities of the tug and tow in case of a collision between themselves, and in case of a collision between either of them and a third ship, have been the subject of decisions, and appear to be as follows:—

As between the tug and her tow, the latter would be solely liable for a collision caused to the tug entirely by the improper orders of those on board the tow, whether the collision were with the tow, or with a third ship. Thus, where a ship, having engaged a tug off Dungeness to take her to Gravesend, ordered her to take the tow-line on board at a time when the state of the weather made it unnecessary and dangerous for her to do so, it was held that the ship in tow was liable for a collision between herself and the tug which occurred whilst the line was being passed from the one ship to the other (*y*).

In the case of an ordinary towage, if no orders are given by the tow as to avoiding a third ship, and a collision occurs between the tow and the third ship, it has been held that the tow, being in fault for giving no

(*r*) *The Jane Bacon*, 27 W. R. 35; *The Stranger*, Brown, Ad. 281; *The Maria Martin*, 12 Wall. 31.

(*s*) *The Mary Hounsell*, 4 P. D. 204.

(*t*) *The Jane Bacon*, 27 W. R. 35.

(*u*) *The Energy*, L. R. 3 A. & E. 48.

(*x*) 27 W. R. 35.

(*y*) *The Julia*, Lush. 224; and see *The Robert Dixon*, 4 P. D. 121; 5 P. D. 54; and *infra*, p. 204.

orders, cannot recover against the tug, either for injury which she herself received in the collision, or for damages which she was compelled to pay to the third ship. And this appears to be so, although the tug could with ordinary care have avoided the collision. A barque in charge of a compulsory pilot was being towed up the Thames. She fell in with a brig working up the river against a head wind. The pilot gave no orders to the tug, and the tug improperly attempted to cross the bows of the brig. The barque cast off her tow-line and attempted to go under the brig's stern, but failed to clear her. The collision might have been avoided if the tug had cast off the tow-line. The pilot gave no orders throughout. The barque was sued by the brig, and damages were recovered against her. In an action brought by the barque against the tug, it was held that she could not recover these damages, being herself partly in fault for the collision (*z*).

The Energy.

This case has been the subject of some discussion. It appears to have been assumed that the negligence of the pilot was contributory negligence on the part of the plaintiffs, or for which they were responsible, so as to prevent them from recovering for a loss caused partly by the fault of the tug. That this would be so where the pilotage is not compulsory is clear; but there is considerable doubt whether the case is the same when the pilot is in charge by compulsion of law, and is not the servant or agent of the shipowner. This question was discussed, though not decided, in a case before the House of Lords. The question was as to the liability of the tug for damage to the tow caused by her getting ashore owing to the tug's negligence, there being also negligence on the part of the compulsory pilot of the tow. It was held (in

Whether tow-owners affected by contributory negligence on part of compulsory pilot in charge of tow.

(*z*) *The Energy*, L. R. 3 A. & E. 48; and see *Smith* v. *St. Lawrence Tow Boat Co.*, L. R. 5 P. C. 308; *The Robert Dixon*, 4 P. D. 121; 5 P. D. 54. As to County Court jurisdiction for breach of towage contract, see *The Isca*, 12 P. D. 34.

Ireland) that the tow could not, in such a case, recover against the tug. The view taken of the facts by the House of Lords rendered the decision of this question unnecessary; but Lords Selborne and Blackburn intimated their opinion that under such circumstances the owners of the tow would not be prevented by the negligence of the pilot from recovering against the tug (*a*).

A further question arises in such a case, whether the rule of equal division of the loss applies as between the tug and her tow. Where a tug, A., was in fault for a collision between her tow, B., and a third ship, C., and C. was also in fault for having an improper light, it was held by the Supreme Court of the United States that the rule of equal division of loss applied as between C. and A. (*b*). In *The Energy* this question does not appear to have been discussed; it seems to have been assumed that the plaintiffs, the owners of the tow, were entitled either to full damages or to nothing.

Tow in collision after being cast off by tug.

A curious case (*c*) arose recently in Quebec. A tug in a gale being over-run by her tow, cast her off. The tow afterwards came into collision with a light-ship, for which, in an action by the owners of the latter, she was held in fault. She subsequently sued the tug, alleging that the collision was caused by the effect of the tow ropes, after being cast off, upon her steering. It was held by the Vice-Admiralty Court that the tug was justified in casting off her tow under the circumstances; it being also found as a fact that the tow was guilty of negligence, and that her steering was not affected by the tow-rope.

Tug undertaking special duties.

Where the towage contract is not upon the ordinary terms, and the tug undertakes a larger responsibility as to

(*a*) *Spaight* v. *Tedcastle*, 6 App. Cas. 217. The same question was considered in another (Irish) case: *Dudman* v. *Dublin Port and Docks Board*, Ir. Rep. 7 C. L. 518. See also *British Columbia Towing and Transport Co.* v. *Sewell*, 9 Duval's Rep. (Canada) 527.

(*b*) *The James Gray* and *The John Fraser*, 21 How. 184.

(*c*) *The Loyal* v. *The Challenger*, 14 Quebec L. R. 135.

the conduct of the tow than is usual, it may be her duty to act without orders from the tow (*d*).

The facts of *The Tasmania* (*e*) have been already stated. The collision there was between the tug and her tow, and was caused by the fault of the master of the tug, who was the servant of the charterer and not of the owner of the tug. It was held that the tug was not liable *in rem* because the tug-master, the wrong-doer, was not the servant of the owners of the tug, and because the charterers and the tug were by the terms of the towage contract protected from liability for negligence of the tug-master.

Tug injured by negligence of another tug towing same ship.

In an unreported case a tug, A., towing a vessel, B., was struck and injured by the tow-rope of another tug, C., which was ahead of A., and also towing B. It was held that the damage was caused by the fault of C. in having too long a scope of tow-line out, and also by the fault of A. in not keeping clear of the tow-line (*f*). The rule of division of loss appears to have been applied.

Recovery by tug against tow.

For injury the tug receives herself, or for damages which she is compelled to pay in respect of a collision between herself and a third ship, she cannot recover against the tow, unless the collision was caused by improper orders, or otherwise by the negligence of the tow. Where she could herself have avoided the collision, had she exercised ordinary care, she clearly could not recover against the tow merely on the ground that the latter gave no orders (*g*). For we have seen that under certain circumstances it is her duty to keep clear of other ships without waiting for orders from the tow.

Limitation of tug-owner's liability.

The liability of the owner of the tug for damage done to the tow by improper navigation of the tug in the performance of the towage contract, is limited by the statute in this as in other cases of collision (*h*).

(*d*) See *The Isca*, 12 P. D. 34.
(*e*) 13 P. D. 110, *supra*, p. 92.
(*f*) *The Digby Grand*, Ad. Ct. 30th April, 1884.
(*g*) See *The Sinquasi*, 5 P. D. 241.
(*h*) *Wahlberg* v. *Young*, 24 W. R. 847; 45 L. J. C. P. 783.

Owners of a salvor towing the salved ship are liable for collision between salved ship and salvor.

The owners of a ship that takes another in tow are not the less liable for a collision between the two ships, caused by the negligence of the towing-ship, because she is engaged as a salvor or quasi-salvor. The steamship *Thetis* fell in with *The Sardis* in a disabled state. The master of *The Thetis* agreed to tow the latter to port. He had received no instructions from his owner as to offering towage or salvage service to other ships, but the policy of insurance effected upon *The Thetis*, and her bills of lading, contained provisions as to her performing such services. In attempting to take *The Sardis* in tow *The Thetis* negligently ran into and sank her. It was held that the master of *The Thetis* was acting within the scope of his employment in undertaking to tow *The Sardis*, and her owners were held liable for the collision (*i*).

Doctrine of common employment does not apply as between tug and servants of owners of tow.

In one case it was contended that, the tug being the servant of the tow, the doctrine of common employment (*k*) applied, as between the tug and the servants of the owners of the tow, so as to prevent the owners of the tug recovering against the tow and her owners damages for a collision between tug and tow caused by the fault of the tow. This argument did not succeed (*l*).

Improper number of ships in tow.

For a collision caused by the fault of the tug in taking an improper number of vessels in tow either between the vessels in tow, or between one of them and a stranger, the owners of the tug would *primâ facie* be liable to the owners of the tow upon the towage contract (*m*). It is not unusual for tug-owners to relieve themselves from this liability by expressly contracting that they shall not be answerable for the negligence of their servants on board the tug (*n*).

The mere fact that one of the vessels in tow strikes and damages another vessel in tow, raises no presumption of negligence on her part. It was so held where the leading

(*i*) *The Thetis*, L. R. 2 A. & E. 365.

(*k*) *Priestly* v. *Fowler*, 3 M. & W. 1.

(*l*) *The Julia*, Lush. 224.

(*m*) See *The United Service*, 8 P. D. 56; 9 P. D. 3.

(*n*) *The United Service*, *ubi supra*.

vessel in tow took the ground, and the following vessel ran into her (*o*).

With whom the command rests where more than one vessel is in tow.

Where two or more ships are in tow of the same tug, and no agreement has been come to between them and the tug as to which ship is to have the command, it has not been decided with whom the command rests (*p*). But it has been held in such a case that one of the ships in tow could not recover against the tug for damage caused by being under way in a thick fog when they ought all to have brought up. It was assumed by the Court that it was the duty of the ship in tow to give the order to bring up (*q*). Where two vessels were in tow of the same tug, without objection on the part of that one of them which was nearest the tug, and this vessel took the ground and was run into by the other astern, it was held that she could not recover against the vessel that ran into her (*r*).

In a Canadian case (*s*) a sailing ship in tow with her sail set, was held in fault for a collision with an overtaking and passing steamship, against which she was driven by another ship in tow of the same tug striking her on her quarter.

Admiralty jurisdiction in case of negligent towage.

The tug can be sued *in rem* for damage to the ship in tow received in a collision caused by negligent towage, whether such damage is sustained by the tow in a collision with a third ship or with the tug (*t*). And the tug may be sued in Admiralty for damages which the tow has been compelled to pay to a third ship for a collision caused by the fault of the tug (*u*).

(*o*) See *Harris* v. *Anderson*, 14 C. B. N. S. 499.

(*p*) *The Gipsy King*, 5 Not. of Cas. 282.

(*q*) *Smith* v. *St. Lawrence Tow Boat Co.*, L. R. 5 C. P. 308.

(*r*) *Harris* v. *Anderson*, 14 C. B. N. S. 499.

(*s*) *The Farewell*, 8 Quebec L. R. 87.

(*t*) *The Nightwatch*, Lush. 542; *The Julia*, *ib.* 224.

(*u*) *The Energy*, L. R. 3 A. & E. 48. It seems that the Admiralty Court has jurisdiction in a claim for damage caused by negligent towage, whether such damage is received in a collision or not: *see sup.* pp. 27, note (*u*), 35. The Admiralty jurisdiction of the United States Courts includes all claims arising out of towage contracts: 2 Parsons on Ship. (ed. 1869), 176, 188; *The Webb*, 14 Wall. 406.

Third party procedure.

Attempts have been made to try the question between tug and tow, as to the ultimate liability for collision with a third ship by means of the third party procedure under the Judicature Act. The existing rules do not enable a third party to be brought in for such a purpose (*x*).

(*x*) See Ord. XVI. r. 48; *infra*, p. 319.

CHAPTER IX.

FOREIGN SHIPS—FOREIGN LAW—FOREIGN JUDGMENTS.

Law applicable to foreign ships; collision in foreign waters.

In collision cases where one or both the ships are foreign, questions frequently arise as to the law applicable to the case, and particularly as to the application of British statutes to foreign ships. The general rule is that municipal laws are binding upon the subjects of the state by which they are enacted everywhere, but upon foreigners only when they are within its jurisdiction (*a*). The principle which governs questions of jurisdiction and remedies has been thus stated: "In regard to the merits and rights involved in actions, the law of the place where they originated is to govern . . . . but the forms of remedies, and the order of judicial proceedings, are to be according to the law of the place where the action is instituted, without any regard to the domicil of the parties, the origin of the right, or the country of the act" (*b*).

Before the passing of 25 & 26 Vict. c. 63, foreign laws, and the general maritime law, touching the steps to be taken to avoid collision, and the extent of the shipowner's liability, differed from the law of this country, and questions of difficulty arose in the case of collisions where one or both ships were foreign as to the law applicable to the case. By the Act above mentioned it is provided, with

(*a*) As to the limits of British jurisdiction, see *The Saxonia* and *The Eclipse*, Lush. 410; *The Annapolis* and *The Johanna Stoll*, Lush. 295; *Regina* v. *Keyn*, *The Franconia*, 2 Ex. D. 63: of Admiralty jurisdiction, *infra*, p. 209.

(*b*) Story's Conflict of Laws, Ch. 14, § 558, 7th ed. p. 702; and see *Donn* v. *Lippman*, 5 Cl. & Fin. 1. So a foreigner in France suing for a collision is subject to the disabilities (*fin de non recevoir*) of the Code de Commerce, Arts. 435, 436; Abordage Nautique, Caumont, §§ 82, 83.

reference to the rule of the road and the extent of shipowners' liability, that in the courts of this country foreign ships shall be judged by the British law. There are, however, several points upon which the decisions above referred to (*c*) are material, and as to which there is some doubt whether British or foreign law is to prevail. As stated above, the general rule—where the matter is not expressly provided for by statute—is, that as to rights and merits the law of the place of collision (*lex loci*), and as to remedies and procedure the law of the tribunal (*lex fori*), is to prevail. The form in which the question may arise at the present day is indicated below.

Jurisdiction of Admiralty Courts where both the ships are foreign.

Actions for collision are said to be *communis juris*, and the Admiralty Court never refused to entertain an action merely because both ships were foreign (*d*), or their owners not British subjects (*e*), or because the collision occurred in foreign waters (*f*).

Limits of Admiralty jurisdiction.

The ancient jurisdiction of the Admiralty extended over all waters where the tide ebbs and flows and where great ships are accustomed to go (*g*); but after the enactment of 13 Ric. II. st. 1, c. 5, and 15 Ric. II. c. 3, and until the modern statutes enlarging the jurisdiction of the Admiralty Court (*h*), the Court was liable to be restrained by prohibition from exercising its jurisdiction if the collision occurred in this country within the body of a county (*i*).

(*c*) See *infra*, pp. 215, 216, as to these cases.

(*d*) *The Johann Friederich*, 1 W. Rob. 35; *The Charkieh*, L. R. 4 A. & E. 120; and see *The Evangelistria*, 25 W. R. 255 (ownership of a foreign vessel); *In re Smith*, 1 P. D. 300; *The Griefswald*, Swab. 430; *The Vivar*, 2 P. D. 29; and *per* Story, J., *The Invincible*, 2 Gall. 29; *The Anna Johnson*, 2 Stuart's V. Ad. Rep. (Canada), 43.

(*e*) In *The Courier*, Lush. 541, neither of the ships were owned by British subjects, and the collision was in foreign waters.

(*f*) In *The Diana*, Lush. 539, decided since 24 Vict. c. 10, the ships were owned by British subjects, and the collision was in foreign inland waters.

(*g*) See *per* Blackburn, J., *Reg.* v. *Anderson*, L. R. 1 C. C. R. 161; *Reg.* v. *Carr*, 10 Q. B. D. 76.

(*h*) 3 & 4 Vict. c. 65; 24 Vict. c. 10.

(*i*) *Martin* v. *Green*, 1 Keb. 730; *Violet* v. *Blague*, Cro. Jac. 514; *Velthasen* v. *Ormsley*, 3 T. R. 315. In *Dorrington's Case*, Moore, 916 (13 Jac. 1), a prohibition went in the case of a collision at Redriffe in

Where not prohibited the Admiralty Court appears to have exercised the jurisdiction even where the collision was in the body of a county, at least where the ship sued was foreign, and the plaintiff would otherwise be without a remedy (*j*). At the present day there is no doubt that the Admiralty Division has jurisdiction, and will exercise it, whether the collision occurs within the ebb and flow of the tide or not, and whether in British or foreign waters or on the high seas (*k*). The liability of a foreign ship that has injured property of a British subject in any part of the world to be detained until satisfaction is made to the sufferer, is referred to below (*l*).

It has been held (*m*) that a County Court has Admiralty jurisdiction in respect of damages by a collision which occurred in a dock connected with a tidal river (the Thames) by a lock. And it seems that the Admiralty Division of the High Court also has jurisdiction in such a case (*n*). Dr. Lushington exercised the jurisdiction in the case of a collision in foreign inland waters—the Great North of Holland Canal (*o*).

Jurisdiction at common law when the collision is abroad.

The common law courts have jurisdiction, whether the ships are British or foreign, and whether the collision occurs in foreign waters, or elsewhere. "The right of all persons, whether British subjects or aliens, to sue in the English courts for damages in respect of torts committed in foreign countries, has long since been established; and,

the Thames. *The Public Opinion*, 2 Hag. 398; *The Eliza Jane*, 3 Hag. 335; *The Lord of the Isles*, cited in *The Public Opinion*, *supra*.

(*j*) *Fairless* v. *Thorsen*, *The Good Intent*, and *The Prince Christian*, Marsden's Ad. Ca. 130. As to Admiralty jurisdiction generally, see *De Lovio* v. *Boit*, 2 Gall. 398; *The Volant*, 1 Not. of Cas. 503, 509. As to Canadian inland waters, see 40 Vict. c. 21 (Canada); *The Picton*, 4 Duval's (Canada) Rep. 648.

(*k*) *The Diana*, Lush. 539 (collision in the Great North of Holland Canal); *The Courier*, Lush. 541; *The Mali Ivo*, L. R. 2 A. & E. 356; as to colonial waters, see *The Peerless*, Lush. 30; as to a collision in a London dock, see *Reg.* v. *Judge of City of London Court*, 10 Q. B. D. 609.

(*l*) *Infra*, p. 211.

(*m*) *Reg.* v. *Judge of City of London Court*, 8 Q. B. D. 609.

(*n*) Under 24 Vict. c. 10, s. 7.

(*o*) *The Diana*, Lush. 539.

as is observed in the note to *Mostyn* v. *Fabrigas* (*p*), there seems to be no reason why aliens should not sue in England for personal injuries done to them by other aliens abroad, when such injuries are actionable both by the law of England, and also by that of the country where they are committed; and the impression which had prevailed to the contrary seems erroneous" (*q*).

Liability of owners resident abroad.

Neither in the Admiralty, nor in the Queen's Bench Division, can a personal action for damages in respect of a collision occurring below low-water mark of the coasts of the United Kingdom be brought against a person not domiciled or ordinarily resident within the jurisdiction, unless the writ of summons can be served within the jurisdiction (*r*).

Detention of foreign ship that has injured property of a British subject.

A foreign ship that has injured a British ship or property of a British subject in any part of the world may be detained if found within three miles of the coasts of the United Kingdom, so as to compel her owners to abide the event of any action in the courts of this country for damage caused by her (*s*). And it seems that in such a case she is liable in an action *in rem* (*t*). But the ship cannot under this Act be detained in respect of personal injury (*u*); and it has been doubted whether she could be seized whilst passing the coasts of this country on a foreign voyage (*x*).

Action in this country for damage to pier abroad.

The question whether an action can be maintained in any court in this country for a wrongful act to a pier or breakwater forming part of the soil of a foreign country has not been decided. It arose in *The M. Moxham*, but,

(*p*) 1 Smith's L. C., 9th ed. 666.

(*q*) *Per* Selwyn, L. J., *The Halley*, L. R. 2 P. C. 193, 202, 203, and see *per* Brett, M. R., 10 Q. B. D. 537.

(*r*) See below, p. 304.

(*s*) 17 & 18 Vict. c. 104, s. 527. *The Christiana*, 2 Hag. 183, is a decision under the similar Act, 1 & 2 Geo. 4, c. 75. In America any property of the owners of the ship sued which is found within the jurisdiction may be seized; 2 Parsons on Ship. (ed. 1869), 390.

(*t*) *The Bilbao*, Lush. 149.

(*u*) *Harris* v. *Owners of The Franconia*, 2 C. P. D. 173.

(*x*) See *per* Cockburn, C. J., *Reg.* v. *Keyn*, 2 Ex. D. 63, 218.

by consent of the parties, no objection to the jurisdiction was taken. James and Mellish, L.JJ., appear to have had doubts as to the jurisdiction (*y*).

Law of negligence and of liability for negligence applicable to foreign ships.

Before the enactment of the existing International Regulations for Preventing Collisions at Sea, the question of negligence in all cases of collision was tried by the general maritime law: in other words, by those rules of seamanship, which, it was assumed, were common to seamen of all nations (*z*). Thus the rule that a vessel on the port tack should bear up for another on the starboard tack was applied to all ships whether British or foreign. And at the present day, so far as the Regulations do not extend, or where they are not applicable, the test of negligence is the same; namely, the general practice of seamen, or, as it is sometimes called, the general maritime law.

Liability for negligence by general maritime law.

The law applicable in this country to cases of collision on the high seas, where one or both ships are foreign, is the maritime law as administered in England, and not the law of the flags (*a*). By that law the shipowner is liable for the negligence of the master and crew of his ship (*b*). And it appears that the liability is the same whether the action is in a court having Admiralty jurisdiction or not (*c*). In the courts of this country, the rights and duties of persons navigating vessels, whether in British

(*y*) See Foote's Priv. Internat. Law, 209 *seq.*

(*z*) See *The Dumfries*, Swab. 63, 125.

(*a*) *The Johann Friederich*, 1 W. Rob. 35; *The Dundee*, 1 Hag. Ad. 120; *The Leon*, 6 P. D. 148; *The Milan*, Lush. 388; Foote's Priv. Internat. Law, pp. 308–403; and see *per* Lindley, L. J., *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, 10 Q. B. D. 521, 545; and *supra*, pp. 3, 94.

(*b*) *Per* Brett, M. R., 10 Q. B. D. 537; Coke's Inst. 4th Pt. fo. 146. *Semble*, only where the master and crew are his agents. It may be noted that the form of sentence by which, according to the ancient practice of the Admiralty Court, the owners, intervening for their interest in an action *in rem*, were condemned in damages, was, that the collision having been caused by the fault or negligence of the master and crew of the ship sued, her owners, therefore, were liable. There is no reference in the sentence to the liability of the owners or of the ship being founded upon the fact of the crew being the agents of the shipowner. See, however, *Waltham* v. *Mulgar*, Moore, 776.

(*c*) *Per* Brett, M. R., 10 Q. B. D. 537; Coke's Inst. 4th Pt. fo. 146.

territorial waters or on the high seas, are the same. It is their duty so to exercise their right as to do no damage to the property of others (*d*). Thus an English telegraph company sued and recovered damages against the owners of a foreign vessel for injury done to the company's cable, which lay at the bottom of the sea, by the ship's anchor (*e*).

In the case of *The Leon* (*f*), in an action *in personam* in the Admiralty Division by the owners of a British ship against the owners resident in England of a Spanish ship for damages in respect of a collision between the two ships on the high seas, it was pleaded that the negligence on the part of the Spanish ship (if any) was negligence of the master or crew, for which, by the law of Spain, the master or crew, and not the shipowners, were liable. It was held by Sir R. Phillimore that by the general maritime law, and by the law of England as administered in Admiralty, the defendants, the foreign owners, were liable.

Again, in a case before the Court of Appeal, an English company, registered under the Companies Act, 1862, were sued in tort by the owners of cargo on board a vessel that was sunk in a collision caused partly by the fault of the defendants' ship, which had a foreign register and sailed under the foreign flag (*g*). The defendants admitting that they represented the foreign owners for the purposes of the action, it was held that they were liable. And it was said that even without the admission the decision would probably have been the same, the foreign owners being bare trustees for the defendants (*h*).

In an action in a common law court by the owners of a British ship against a French subject for a collision with

(*d*) *Per* Willes, J., *Submarine Telegraph Co.* v. *Dickson*, 15 C. B. N. S. 759, 779.

(*e*) *Submarine Telegraph Co.* v. *Dickson*, *ubi supra*.

(*f*) 6 P. D. 148.

(*g*) To enable her to trade with the Dutch East Indies she was registered in Holland in the name of a Dutch company, the members of which were the same as those of the English company.

(*h*) *Chartered Mercantile Bank of India, &c.* v. *Netherlands India Steam Navigation Co.*, 10 Q. B. D. 521, 545.

a French ship on the high seas, it was pleaded that the injury complained of happened out of British jurisdiction, and that it was not committed by the defendant personally, but by the master of the French ship; that the defendant was a French subject; that by the law of France he was not liable for the acts of the master; and that by the same law a French corporation, who were the proprietors of the ship, and the master's employers, were alone liable. The plea was held good (*i*).

Application of foreign law as to liability for negligence.

The liability depends, in some cases, upon the law of the place where the collision occurs, and of the country to which the ship belongs. If it occurs in the territorial waters of a country by the law of which an owner is not liable for the wrongful acts of his officers or crew, it seems that he would not be liable in the courts of this country (*k*). For the question whether a particular person is liable for an act which is wrongful by the law of the place where it is committed depends on the substantive law of the country where the act is done (*l*). In such a case, therefore, it is the *lex loci* and not the *lex fori* which governs. Nor is the defendant liable, in this country, for a collision in a foreign country, unless the negligence causing the collision is that of a person for whose acts he is responsible by the law of England. "No action can be maintained in the courts of this country on account of a wrongful act either to a person or to personal property committed within the jurisdiction of a foreign country, unless the act is wrongful by the law of the country where it is committed, and also by the law of this country" (*m*).

In *The M. Moxham* an English company, possessed of a pier in Spain, instituted an action in the Admiralty Court against a British ship for negligently injuring the pier.

(*i*) *General Steam Navigation Co.* v. *Gillou*, 11 M. & W. 877, 895.

(*k*) See *per* Brett, M. R., *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, 10 Q. B. D. 521, 536.

(*l*) *Per* Mellish, L. J., *The M. Moxham*, 1 P. D. 107, 113.

(*m*) *Per* Mellish, L. J., in *The M. Moxham*, 1 P. D. 107, 111; and see *per* Lord Blackburn, *The Vera Cruz*, 10 App. Cas. 59, 72.

The shipowners, by their answer, pleaded that by the law of Spain they were not liable for the negligence of the crew in the navigation of the ship. The Court of Appeal held that, assuming the Court had jurisdiction, the law of Spain was applicable, and that the plea was good (*n*).

So if the collision occurs in foreign waters by the fault of a pilot the employment of whom is compulsory by the foreign law, the owners will not be liable in the courts of this country; and they are not liable here, although by the law of the place of collision they would be liable in the foreign court (*o*).

Order of claims against a ship is *lex fori*.

It has been held, where there are several claims against a ship, that they must rank and be paid according to British law, the matter being governed by the *lex fori* (*p*).

Rule of the road for foreign ships.

The statutory rules as to steps to be taken to avoid collision, which were contained in the Merchant Shipping and other Acts previous to 25 & 26 Vict. c. 63, were held not to apply in the case of a collision between two foreign ships, or a British and a foreign ship, on the high seas. The question of negligence in such cases was tried by the general maritime law, under which the steps required to be taken to avoid collision were not always identical with those required by the British statute. A ship, therefore, meeting another on the high seas, had to obey one rule, if both ships were British, and another, and a different rule, if one were not British (*q*). This state of things, which could not fail to be productive of collisions, led to the adoption of the existing International Regulations (*r*).

(*n*) *The M. Moxham*, 1 P. D. 107.

(*o*) *The Halley*, L. R. 2 P. C. 193; and see *The Guy Mannering*, 7 P. D. 52, 132; *The Augusta*, 6 Asp. M. C. 58, 161.

(*p*) *The Union*, 3 L. T. N. S. 280; Story, Conflict of Laws, par. 571.

(*q*) *The Dumfries*, Swab. Ad. 63; *The Saxonia* and *The Eclipse*, Lush. 410; *The Zollverein*, Swab. Ad. 96; *The Elizabeth*, 3 L. T. N. S. 159. The general maritime law embodied the "port tack" rule—that a sailing ship on the port tack should give way to another on the starboard tack: see *The Dumfries*, *ubi supra*.

(*r*) As to the circumstances under which these Regulations were promulgated, see *infra*, p. 341.

No question as to the rule of the road, or as to the law applicable to the particular case, such as arose in the cases decided under former Acts, can now be raised. All maritime nations having adopted the Regulations, and the courts of this country being required by the municipal law to apply the Regulations to the ships of all nations that have adopted them, the rule of the road is the same for all ships, and is recognized alike by international, municipal, and maritime law (*s*).

Application of British local regulations to foreign ships.

Foreign ships, equally with British ships, are bound to know and observe local Regulations for preventing collisions in force in various rivers and harbours of this country (*t*).

Application to British ships of foreign local regulations.

Foreign municipal regulations as to ships' lights, and rules to be observed in navigating foreign waters, though they have not in the courts of this country the force of law, may, as evidence of negligence, be of importance in determining the liability for a collision in such waters. The effect of special regulations made by the Government of this or a foreign country for its ships of war and for ships under convoy is expressly saved by the Regulations (*u*).

Application to foreign ships of rules as to presumption of fault contained in the British statute.

The law by which the owners of a ship that has been in collision are, upon proof of certain circumstances as to infringement of the Regulations, or as to not assisting the other ship, made liable for the collision, without proof of actual negligence upon the part of their ship, has been considered in a former chapter (*x*). There seems to be no

(*s*) The exceptions with regard to fishing vessels' lights created by the Regulations of 1884 (as to which see *infra*, p. 385), are probably temporary, it being, doubtless, intended to obtain the adherence of foreign nations to one Code. In one case a Portuguese Court placed a construction upon one of the Regulations, which was directly opposite to that borne by the English version. This was clearly an error of the Portuguese Court, and has been corrected; see *infra*, p. 345.

(*t*) 25 & 26 Vict. c. 63, ss. 32, 57; see *The Fyenoord*, Swab. Ad. 374; *The Seine*, *ibid.* 411, as to the law on this subject under the M. S. Act, 1854; and see *The Michelime* and *The Dacca*, Mitch. Mar. Reg. 1877, as to the application to British ships of local Regulations abroad.

(*u*) Art. 26, *infra*, p. 527.

(*x*) *Supra*, pp. 38, 65.

doubt that these enactments apply to foreign ships (*y*). In various cases the rule as to infringement of the Regulations has been assumed to apply to a British and foreign ship in collision in British waters and also on the high seas (*z*). The wording of the enactment as to not standing by to assist favours the contention that that part of the section which relates to presumption of fault applies to foreign as well as British ships. Both sections, moreover, would probably be held to be rules of evidence, or otherwise applicable to foreign ships as *lex fori* (*a*).

(*y*) *The Magnet*, L. R. 4 A. & E. 417; see *per* Sir R. Phillimore in *Reg.* v. *Keyn*, 2 Ex. D. 63, 85. The doubt expressed by the Privy Council in *The Fanny M. Carvill*, 2 Asp. Mar. Law Cas. 565, 569, appears to be not well founded.

(*z*) *The Englishman*, 3 P. D. 18; *The Voorwaarts* and *The Khedive*, 7 App. Cas. 795; *The Vera Cruz* (No. 1), 9 P. D. 88. See also *The British Princess* and *The Sedmi Dubrovacki*, Ad. Ct. March 11—14th, 1878, Mitch. Mar. Reg.; *The Magdeburgh* and *The Henry Willard* (American), Ad. Div. 16th Jan. 1885; *The Love Bird*, 6 P. D. 80. It will be noticed that in 36 & 37 Vict. c. 85, there is no enactment corresponding to s. 58 of 25 & 26 Vict. c. 63, whereby in certain cases power is given to apply by Order in Council provisions of the Act relating to collisions to foreign ships out of British jurisdiction.

(*a*) It was held by Dr. Lushington in *The Zollverein*, Swab. Ad. 96, that s. 298 of 17 & 18 Vict. c. 104, was a *lex fori* relating to remedies. In that case the section was held not to apply in the case of a collision between a British and a foreign ship on the high seas, so as to prevent the British ship from recovering against the foreigner. The ground of the decision was that the previous section (s. 296), containing the rule of the road, was a municipal law not applicable to foreign ships on the high seas, and that therefore s. 298, which depended on s. 296, had no application to the foreign ship. Since, therefore, the foreigner was not prevented by s. 298 from recovering against a British ship that to which by the maritime law he would be entitled, it was held to be unfair to allow the foreigner to avail himself of a breach by the British ship of the municipal law as a defence. The existing Regulations being international, it is submitted that the decision in *The Zollverein*, as to the application of s. 298 of the Act of 1854, affords no ground for contending that s. 17 of the Act of 1873 does not apply to foreign ships. In *The Nevada*, 1 Asp. Mar. Law Cas. 477, however, the Vice-Admiralty Court of N. S. Wales held that s. 33 of the Act of 1862 did not apply to an American ship. In *The Germania*, 3 Mar. Law Cas. O. S. 140, s. 29 of 25 & 26 Vict. c. 63, was applied to a foreign ship; but in the same case on appeal (*ibid.* 269) Lord Romilly appears to have considered that s. 33 of that Act (as to "standing by") applied only to British ships. In *The Thuringia*, 1 Asp. Mar. Law Cas. 283, nothing was said as to the application of that section to a foreign ship on the high seas. As to the effect of ss. 57 and 58 of the same Act, see the observations of Lord Chelmsford in *The Amalia*, 1 Moo. P. C. C. N. S. 471, 485. See further as to these enactments, *supra*, pp. 38—65.

Defence of "compulsory pilotage" available for foreign ships.

The defence of compulsory pilotage is available for a foreign as well as for a British ship (*b*). The statutory exemption of owners from liability for damage done by a ship when in charge of a compulsory pilot probably applies to foreign ships (*c*); and, independently of the statute, foreign as well as British owners are not liable for the acts of a person placed in charge of their ship by the state (*d*).

The employment of a pilot may, by statute, be made compulsory on a foreign ship visiting this country, even where she is beyond three miles from the shores of the United Kingdom (*e*).

Compulsory pilotage abroad.

The owners of a British ship, which had been in collision with a foreign ship in the Scheldt, were sued by the foreign ship in this country. The British ship alleged that the collision was caused entirely by the negligence of the pilot, whom, by the Belgian law in force in the Scheldt, she was compelled to take. By the Belgian law owners are liable for the acts of a compulsory pilot. It was held by the Privy Council (reversing the decision of Court below) that the Belgian law, which imposed a liability upon owners to which they were not subject, either by the law of this country or by any principle of justice, had no application, and that the British owners were not liable (*f*).

Statutory limitation of liability applies to foreign ships.

In a former chapter it has been stated that the common law right of a sufferer by collision to obtain from the wrong-doer a full recompense has, from time to time, been

(*b*) As to compulsory pilotage generally, see Ch. X.

(*c*) As did the former Pilotage Act, 6 Geo. 4, c. 125, s. 55; see *The Christiana*, 2 Hag. 183.

(*d*) 17 & 18 Vict. c. 104, s. 388; *The Maria*, 1 W. Rob. 95, 106. In *The Girolamo*, 3 Hag. Ad. 169, and other cases under 6 Geo. 4, c. 125, it was held that the statutory exemption of owners from liability for the fault of a compulsory pilot did not apply so as to exempt the owners of a foreign ship in proceedings *in rem*. In *The Vernon*, 1 W. Rob. 316, Dr. Lushington appears to have considered that the statutory exemption of owners was *lex fori*.

(*e*) *The Annapolis* and *The Johanna Stoll*, Lush. 295; but see 41 & 42 Vict. c. 73.

(*f*) *The Halley*, L. R. 2 P. C. 193; in the Court below, *ibid.* 2 A. & E. 3; see also *The Guy Mannering*, 7 P. D. 52, 132; *The Augusta*, 6 Asp. M. C. 58, 161.

considerably modified by British statutes. Until the passing of 25 & 26 Vict. c. 63, the Act now in force, there was frequently great difficulty, in cases where one or both the ships in collision were foreign, in determining whether the municipal law limiting owners' liability was, or was not, applicable (*g*). At the present day no such difficulty can arise. Whether the ships are both British, or both foreign, or one British and one foreign, and whether the collision occurs in British waters or on the high seas, the limit of owners' liability is the same, namely, that fixed by 25 & 26 Vict. c. 63.

In *The Amalia* (*h*) it was held that the liability of the owners of a British ship in collision with a foreign ship on the high seas (in the Mediterranean) is limited by the Act of 1862. It was contended that the Legislature had no power to alter the rights of foreigners in the case of a collision on the high seas, or to limit the amount of the damages to which by the maritime law they were entitled. It was, however, held by the Privy Council (affirming the decision of Dr. Lushington) that there is no breach of international law in such legislation; and it was said by Lord Chelmsford, in the course of the judgment, and the decision in the case went upon the principle that the owners of a foreign ship in a similar case would be entitled to the benefit of the Act, by which in all cases the liability of the owners of a foreign ship is limited in the same way,

(*g*) The provisions of the M. S. Act, 1854, did not, in terms, apply to foreigners. Under this Act it was held that the liability of the owners of a British ship in collision with a foreigner, within three miles of the shores of the United Kingdom, was limited: *General Iron Screw Collier Co.* v. *Schurmanns*, 1 J. & H. 180; but see *The Saxonia*, Lush. 410, where this case was questioned; that the liability of the owners of two foreign ships in collision on the high seas, beyond that distance from the United Kingdom, was unlimited: *Cope* v. *Doherty*, 4 K. & J. 367; on app. 2 De G. & J. 614; and that the liability of the owners of a foreign ship in collision with a British ship, beyond the three mile limit, was unlimited: *The Wild Ranger*, Lush. 553; even although the foreign ship's liability by the municipal law of her own state were the same as that of the British ship by British law: *The Wild Ranger*, *ubi supra*.

(*h*) Br. & Lush. 151; 1 Moo. P. C. C. N. S. 471.

and to the same extent, as that of owners of a British ship (*i*).

Rule as to division of loss applies to foreign ships.

The rule as to division of loss where both ships are in fault for a collision appears to have been applied as part of the law maritime to all collisions, whether in British or foreign waters or on the high seas, and whether the ships were both British, or both foreign, or one British and one foreign. And the statute 36 & 37 Vict. c. 66, extending its operation to the courts other than those having Admiralty jurisdiction, appears to have an equally wide operation (*k*).

And the rule has been applied in a case of collision between two ships belonging to the same owners, as between a foreign cargo-owner suing the British owners of a ship sailing under a foreign flag for loss of cargo in a collision caused by the fault both of the carrying ship and of the other ship (*l*).

Arrest of ship of a foreign sovereign.

It is a principle of international law that a sovereign prince or state cannot be sued in a foreign Court. And it seems that this principle applies in the case of proceedings *in rem* against the public ship of a foreign sovereign (*m*). But it has been said by Sir R. Phillimore that if a ship of a foreign sovereign engages in trade she is liable to arrest, and the sovereign must be taken to have waived the privilege of immunity from arrest which attaches to a public ship of a foreign state (*n*). It has also been held

(*i*) It seems that the law limiting owners' liability is not *lex fori*. Such was the opinion of Wood, V.-C., in *Cope* v. *Doherty*, 4 K. & J. 367, 384; and in *The General Iron Screw Collier Co.* v. *Schurmanns*, 1 J. & H. 180, 197. In *The Amalia* the Privy Council expressed no opinion upon the point, but Dr. Lushington (Lush. p. 153) was of the same opinion as Wood, V.-C., in the cases above mentioned; Cf. also *per* Lord Stowell in *The Carl Johan*, mentioned in *The Girolamo*, 3 Hag. Ad. 169, 186; see *sup.* p. 218.

(*k*) See *supra*, p. 134.

(*l*) *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, 10 Q. B. D. 521.

(*m*) *The Constitution*, 4 P. D. 39. See, however, *The Charkieh*, L. R. 4 A. & E. 59; *ib.* 8 Q. B. 197.

(*n*) *The Charkieh*, *supra*; but the dictum was not necessary to the decision of the case; and see the observations of the Court of Appeal upon this case, 5 P. D. 217; *The Swift*, 1 Dods. Adm. 320, 339.

that it is not in the power of the Crown, without the consent of Parliament, to exempt from liability to arrest the trading ship of a foreign sovereign (*o*).

A frigate of the United States was stranded on the south coast of England, and received salvage services from an English tug. She had on board, under an Act of Congress and for public purposes, cargo owned by American citizens. The tug-owner sought to arrest the frigate and her cargo in a claim for salvage. It was held that no warrant for arrest could issue either in respect of ship or cargo (*p*).

The Parlement Belge, a vessel belonging to the King of the Belgians, commanded and manned by officers and men commissioned and paid by him, was engaged in carrying mails in connection with the British Post Office, together with passengers and cargo. On her voyage from Ostend to Dover, when close to Dover pier, she ran into a British ship at anchor. Notwithstanding the fact that a convention had been entered into between her Majesty and the King of the Belgians declaring that the mail boats, of which *The Parlement Belge* was one, should be deemed to be ships of war and should not be liable to arrest, it was held by Sir R. Phillimore that she was liable in proceedings *in rem* at the suit of the owner of the injured vessel. This decision was reversed by the Court of Appeal upon the following grounds: (1) That the person and the property of a foreign sovereign are exempt from the jurisdiction of a British Court upon the same grounds, namely, that the exercise of such jurisdiction is incompatible with the absolute independence of the Sovereign of every superior authority; (2) That this principle applies to an Admiralty action *in rem;* (3) That a ship owned and used by a State or Sovereign for public purposes is exempt from

(*o*) *The Parlement Belge*, 4 P. D. 129. In the Court of Appeal (5 P. D. 197) this question was not considered.

(*p*) *The Constitution*, 4 P. D. 39.

arrest, whether process *in rem* is considered as a proceeding against the ship or against the shipowner; (4) That in an action *in rem* the shipowner is indirectly impleaded. The question whether the ship was exempt from arrest by virtue of the convention mentioned above (p. 221) was not considered.

Foreign sovereign suing in British Court must give bail to answer counter-claim.

Where one of the ships in collision is a public ship of a foreign government, and the foreign government sues the other ship in an Admiralty Court of this country, proceedings in the action will be stayed upon the application of the owners of the defendant ship, until the foreign plaintiffs give bail to answer a counter-claim made by the defendant owners (*q*).

Foreign governments occasionally submit that the question of liability for a collision in which their man-of-war, or other public ship, is involved, shall be determined by the Courts of this country. In such a case it appears that the Regulations for Preventing Collisions at Sea are material upon the question of negligence (*r*), though probably not expressly binding upon such ships (*s*).

Application of Lord Campbell's Act to foreigners and foreign ships.

It was held by Sir R. Phillimore that the representatives of foreigners killed in a collision on the high seas on board a foreign ship can recover damages under Lord Campbell's Act in the Courts of this country (*t*); and under the same Act a foreign ship has been made liable, in proceedings *in rem*, for loss of life on the high seas caused by her negligent navigation (*u*). These cases, however, must be now considered as overruled, so far as they decide that the Admiralty Division has jurisdiction *in rem*

(*q*) *The Newbattle*, 10 P. D. 33.
(*r*) See *The Lord Byron*, cited Maude & Pollock on Ship. 4th ed. 607, note (*k*).
(*s*) See Art. 26, *infra*, p. 527.
(*t*) *The Explorer*, L. R. 3 A. & E. 289.
(*u*) *The Guldfaxe*, L. R. 2 A. & E. 325. The collision in this case was between a Norwegian vessel and a British fishing lugger. The plaintiffs were the representatives of four of the crew of the lugger, who were British subjects: see note, *The Explorer*, L. R. 3 A. & E. 289, 290.

in an action in which damages are claimed under Lord Campbell's Act (*x*).

It seems that 17 & 18 Vict. c. 104, s. 512, relating to proceedings by the Board of Trade in case of loss of life or personal injury, does not apply to a foreign ship; and that this is the case whether the collision is in British or foreign waters or on the high seas. In such a case, therefore, an action may be brought under Lord Campbell's Act for personal injury caused by a foreign ship, without regard to the institution of proceedings by the Board of Trade (*y*). But it has been pointed out that in such a case there is no jurisdiction to proceed in Admiralty against the ship (*z*).

Whether 17 & 18 Vict. c. 104, s. 512, applies to foreign ships.

In the case of a collision in foreign waters, or between foreign ships, if it is clear that an action *in rem* is pending in a foreign Court in respect of the same matter, the Court has a discretion (*a*) to stay its proceedings, or to put the plaintiff to his election whether he will abandon one or other of the actions (*b*). Where an action by the owners of ship A. against ship B. was pending in a Vice-Admiralty Court abroad, proceedings by the owners of ship B. against ship A. in the English Admiralty were stayed (*c*).

Lis alibi pendens in a foreign court.

In a case of wilful damage by the master of a foreign

(*x*) *The Vera Cruz* (No. 2), 9 P. D. 96; affirmed, 10 App. Cas. 59; *Aliter* in America, *Ex parte Gordon*, 14 Otto, 515.

(*y*) It was so held in *The Vera Cruz* (No. 1), 9 P. D. 88, where the collision was in British waters, by Butt, J., after long argument. The case, however, is not decisive, because it was subsequently decided by the Court of Appeal, *The Vera Cruz* (No. 2), 9 P. D. 96, that the Court below had no jurisdiction in the case.

(*z*) *The Vera Cruz* (No. 2), *supra*.

(*a*) As to the validity of the plea of *lis alibi pendens* in a foreign court, as a defence, see *per* Pollock, C. B., in *Scott* v. *Seymour*, 1 H. & C. 219, 229.

(*b*) See *Mutrie* v. *Binney*, 35 Ch. D. 614, followed in *The Christiansborg*, 10 P. D. 141; *The Mali Ivo*, L. R. 2 A. & E. 356; *The Catterina Chiazzare*, 1 P. D. 368; see *The Delta*, 1 P. D. 393, 404; *The Lanarkshire*, 2 Sp. A. & E. 189; *Hyman* v. *Helm*, 24 Ch. D. 531; *McHenry* v. *Lewis*, 22 Ch. D. 397; *The Reinbeck*, 6 Asp. M. C. 366, as to the circumstances under which an action in England will be restrained pending an action in respect of the same matter abroad.

(*c*) *The Peshawur*, 8 P. D. 32.

ship to another foreign ship in foreign waters, the Admiralty Court refused to entertain the action (*d*).

Res judicata: effect of foreign judgment.

The judgment of a competent foreign Court (and for this purpose Irish, Scotch, and Colonial Courts are foreign Courts) delivered before action brought in this country (*e*) upon the merits (*f*) of a collision, given in the presence of both parties, is, if final and conclusive (*g*), a bar to an action in this country between the same parties (*h*) for the same collision (*i*). The Courts of this country will not entertain an action in such a case, although fresh evidence may have been discovered, and although all the facts were not before the foreign tribunal (*j*); nor because the foreign Court was misinformed as to English law (*k*). If the parties are not the same, as where the ship-owners sue in one country and the cargo-owners in the other (*l*); or if the foreign tribunal had not jurisdiction (*m*); or if the plaintiffs in this country were not subjects of, nor resident, nor present in the foreign country, and did not as plaintiffs abroad select the foreign tribunal (*n*): or if the foreign judgment went by default (*o*); or was against natural justice, as where the foreign judges were interested

(*d*) *The Ida*, Lush. 6. It has been pointed out that this case was decided before 24 Vict. c. 10, came into force.

(*e*) *The Delta*, 1 P. D. 393. See *Houstoun* v. *Marquis of Sligo*, 29 Ch. D. 448.

(*f*) *The Delta, ubi supra*; *Harris* v. *Quine*, L. R. 4 Q. B. 653.

(*g*) *Henderson* v. *Henderson*, 3 Ha. 117; *Plummer* v. *Woodburn*, 4 B. & C. 625, 637; *Frayes* v. *Worms*, 10 C. B. N. S. 149; *Nourion* v. *Freeman*, 15 App. Cas. 1; (decision on collateral points not binding) *Concha* v. *Concha*, 11 App. Cas. 541.

(*h*) As to what is a judgment between the same parties, *Arnison* v. *Smith*, 40 Ch. D. 567.

(*i*) See Phillimore's Internat. Law, 2nd ed. IV. 733 *seq.*; Westlake's Priv. Internat. Law, 376; Foote's Priv. Internat. Law, 476; Roscoe, Nisi Prius, 15th ed. 196.

(*j*) *Re Trufort*, *Trafford* v. *Blanc*, 36 Ch. D. 600.

(*k*) *Godard* v. *Gray*, L. R. 6 Q. B. 139.

(*l*) Cf. *The Pennsylvania*, 19 Wall. 125; *The Pennsylvania*, 3 Mar. Law Cas. O. S. 477. As to the effect of a foreign judgment *in rem*, see *Castrique* v. *Imrie*, L. R. 4 H. L. 414.

(*m*) *The Griefswald*, Swab. 430; *Havelock* v. *Rockwood*, 8 T. R. 268.

(*n*) *General Steam Navigation Co.* v. *Gillou*, 11 M. & W. 877, 894. See also *The Griefswald*, *ubi supra*.

(*o*) *The Delta*, *The Erminia Foxolo*, 1 P. D. 393.

parties (*p*); or where the defendant had never been summoned (*q*); or was in defiance of the comity of nations, as where the foreign court refuses to recognise title acquired by the law of England (*r*); or if the foreign judgment was obtained by fraud (*s*),—it is not a bar to an action in this country, and in an action here the foreign judgment in such cases is not admissible in evidence (*t*). A judgment *in personam* is, it seems, a bar to an action by the same plaintiff *in rem* (*u*).

A foreign judgment may be pleaded in bar, so long as it remains unreversed, and notwithstanding that an appeal is pending (*x*).

Foreign judgment *in rem*; whether it can be enforced by arrest of ship here.

The City of Mecca, a British steamship, was in collision on the high seas with a Portuguese ship. *The City of Mecca* was arrested in Portugal and found by the Portuguese Court to be in fault for the collision. Owing to some irregularity in the proceedings she was released from arrest by the Portuguese authorities, and came to England, the foreign judgment remaining unsatisfied. She was arrested in England by the plaintiffs in the Portuguese action; and it was held by Sir R. Phillimore that international comity required that the English Admiralty Court should enforce the decree of the Portuguese Court (*y*). In the Court of Appeal it appeared, for the first time, that the Portuguese action was *in personam* and not *in rem*; and it was held, in consequence, that the foreign judgment, not having created

(*p*) *Price* v. *Dewhurst*, 8 Sim. 279.

(*q*) *Ferguson* v. *Mahon*, 11 Ad. & El. 179; *Buchanan* v. *Rucker*, 9 East, 192; *S. C.*, 1 Campb. 63; *Cassan* v. *Stewart*, 1 Stark. 525.

(*r*) *Simpson* v. *Fogo*, 1 J. & H. 18; 1 H. & M. 195.

(*s*) Foote's Private International Law, 476; *Godard* v. *Gray*, L. R. 6 Q. B. 139; *Abouloff* v. *Oppenheimer*, 10 Q. B. D. 295; *Vadala* v. *Lawes*, 25 Q. B. D. 310.

(*t*) *Castrique* v. *Imrie*, L. R. 4 H. L. 414, 427.

(*u*) *The Griefswald*, Sw. 430; but see *infra*, pp. 308, 317.

(*x*) *Castrique* v. *Behrens*, 30 L. J. Q. B. 163; *Munro* v. *Pilkington*, 31 L. J. Q. B. 163.

(*y*) 5 P. D. 28.

a maritime lien, the vessel had been wrongly arrested in the Admiralty action in this country (*z*).

Criminal liability of foreigner.

The criminal liability in the courts of this country of a foreigner, in respect of a collision whereby a British subject or a foreigner is killed or injured, is considered in another chapter (*infra*, p. 299).

(*z*) 6 P. D. 106.

CHAPTER X.

COMPULSORY PILOTAGE.

A PILOT whom the owner or master of a ship voluntarily employs to navigate the ship is the servant of the owner for that purpose; the owner is answerable for a collision caused by his fault or negligence (*a*), and his ship is liable in Admiralty.

Pilot voluntarily employed is the owner's servant.

In some waters and under certain circumstances the law requires a ship to be placed in charge of, and navigated by, a qualified or licensed pilot; and in such cases it is a statutory offence (*b*) on the part of the owner or person in charge of the ship not to take a pilot on board. A pilot taken under these circumstances, called a "compulsory" pilot, is held to be placed in charge of the ship by the law, and to supersede the master in the conduct of the ship so long as she is in pilotage waters. He is not the servant or agent of the owner; and for a collision caused entirely by his negligence neither is the owner answerable at law nor the ship in Admiralty. In such a case the remedy of the injured person is against the pilot alone (*c*).

Aliter where the pilot is placed in charge by the law.

Pilotage is held to be compulsory, so as to exempt owners from liability for the acts of the pilot, in all British waters, and for all ships, in and for which the employment of the pilot is enforced by penalty (*d*), or where the

What constitutes compulsory pilotage.

(*a*) See *The Maria*, 1 W. Rob. 95, 108; *The Eden*, 2 W. Rob. 442.

(*b*) See note (*d*), *infra*.

(*c*) See *Stort* v. *Clements*, Peake, 107, as to the liability of the pilot; see also *The Octavia Stella*, 6 Asp. M. C. 182, where the damage was occasioned to an oyster bed.

(*d*) Usually double the amount of the pilotage charge, or in some cases a sum not exceeding 100*l.*; 17 & 18 Vict. c. 104, ss. 353, 354. Under 6 Geo. 4, c. 125, s. 59, there was in some cases an additional penalty.

pilotage charge can be recovered against the ship or her owners, whether the pilot is employed or not (*e*).

In some foreign waters pilotage is compulsory in the sense that payment of pilotage charges is compulsory, but the shipowner is nevertheless liable for the pilot's negligence. This difference in the owner's liability, due to the different position and authority of the foreign pilot, is explained below (pp. 231, 232).

The pilotage authority is not liable.

Attempts have in some cases been made to recover from the pilotage authority damages for a collision caused by the fault of a licensed pilot, but with little success (*f*). In one (Scotch) case, however, where the circumstances were peculiar, a harbour authority was held liable for the negligence of a person acting as pilot, on the ground that he was their servant. The harbour authority, having power to license pilots under the Merchant Shipping Act, 1854 (ss. 330—388), was held liable for injury to a steamer entering the harbour, caused by the fault of a boatman, not licensed as a pilot, who was acting in charge of the steamer as pilot, and was employed by the defendants, the harbour authority (*g*).

H.M. ships not subject to compulsory pilotage.

Queen's ships are not subject to compulsory pilotage (*h*).

Owner liable for collision by fault of master holding pilotage certificate.

Masters and mates of home-trade passenger ships may obtain from pilotage authorities certificates enabling them to pilot a specified ship or ships within the waters over which the pilotage authority has jurisdiction (*i*). By the London Trinity House these certificates are granted to masters and mates, enabling them to pilot any ship belonging to the same owner (*k*). For a collision caused by the negligence of a master or mate holding such a certificate the owner is liable.

(*e*) *Carruthers* v. *Sidebotham*, 4 M. & S. 77; *The Maria*, 1 W. Rob. 95, 109; *The Arbutus*, 2 Mar. Law Cas. O. S. 136; *The Hibernian*, L. R. 4 P. C. 511.

(*f*) See *supra*, p. 102.

(*g*) *Holman* v. *Irvine Harbour Trustees*, 4 Sess. Cas. 4th ser. 406.

(*h*) 17 & 18 Vict. c. 104, ss. 4, 353; 6 Geo. 4, c. 125, s. 86.

(*i*) 17 & 18 Vict. c. 104, ss. 340—344, 355; *The Killarney*, Lush. 202; *The Earl of Auckland*, Lush. 164, 387.

(*k*) See Order in Council of 16th July, 1857.

Owners exempt from liability for fault of compulsory pilot at common law.

The non-liability of the shipowner for the negligence of a compulsory pilot depends not only upon the common law (*l*); it is further declared by statute. The statute (17 & 18 Vict. c. 104, s. 388) is as follows:—

And by statute 17 & 18 Vict. c. 104, s. 388.

"No owner of or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law" (*m*).

Semble, pilot on board tow is not "acting in charge of" the tug.

It appears to have been held by Sir R. Phillimore in *The Mary* (*n*) that a pilot in charge by compulsion of law of a ship in tow is not acting in charge of the tug within the meaning of this section.

Effect of 17 & 18 Vict. c. 104, s. 388.

The precise effect of the statute is not clear. Probably it is merely declaratory of the common law (*o*). The law as to the non-liability of the ship in Admiralty for damage by a compulsory pilot was for some time doubtful (*p*). The statutory exemption from liability may have had reference to this doubt. In *The Maria* (*q*) Dr. Lushington said, "The leading principle of the Legislature in exonerating owners from any liability for damage occasioned by their vessels having pilots on board is this: that the masters are compellable to take pilots on board, and the owners are not responsible for the acts of the persons to whom they are thus forced to commit the management of their property, and over whom they have no control. This,

(*l*) *The Maria*, 1 W. Rob. 95; *The Halley*, L. R. 2 P. C. 193; *The Annapolis* and *The Johanna Stoll*, Lush. 295.

(*m*) This enactment applies to the United Kingdom only: see s. 330. The Civil Code of St. Lucia (Art. 2268) is to the same effect. For previous (British) legislation, see 52 Geo. 3, c. 39, s. 30; *Ritchie* v. *Bousfield*, 7 Taunt. 309; 6 Geo. 4, c. 125, s. 55.

(*n*) 5 P. D. 14; and see *The Clan Gordon*, 7 P. D. 190, *infra*, p. 233, as to the meaning of "any person having the care of any ship" in a local Act.

(*o*) See *per* Brett, M. R., *The Hector*, 8 P. D. 218, 224; *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.*, L. R. 4 Ex. 238.

(*p*) *Longridge* v. *Dorville*, 5 B. & Ald. 117 (1821).

(*q*) 1 W. Rob. 95, 99.

I apprehend, is a rule founded upon a great principle of justice and equity" (*r*).

Owner's exemption from liability under 6 Geo. IV. c. 125, is larger than under 17 & 18 Vict. c. 104.

These remarks were made in a case decided under a previous pilot Act, 6 Geo. IV. c. 125, s. 55. The provisions of that Act (which is now repealed) with regard to the non-liability of the shipowner for a collision occurring whilst a compulsory pilot was on board his ship, were different in terms and in effect from those of the Act now in force. One difference between the earlier Act and 17 & 18 Vict. c. 104, s. 388, is pointed out by Lord Romilly, M. R., delivering the decision of the Privy Council in *The Lion* (*s*). The exemption of owners from liability created by the earlier Act extends to cases where a licensed pilot is acting in charge of the ship under the provisions of the Act, whether by compulsion of law or by the shipowner's appointment (*t*). The later statute, 17 & 18 Vict. c. 104, s. 388, applies only where the pilot is in charge by compulsion of law. But the remarks of Dr. Lushington in *The Maria*, cited above, as regards the principle of the statutory exemption of owners from liability for the acts of a compulsory pilot, are not less applicable to the existing enactment than they were to the Act of George IV.

A further difference between the earlier Act and the existing Act is that under the earlier Acts the exemption was only where the pilot acted "under or in pursuance of" the Act. These words gave rise to questions as to what pilotage districts were referred to (*u*).

Foreign ships.

The enactments as to compulsory pilotage are binding upon foreign as well as British ships (*x*).

(*r*) See also the judgment in *The Bilbao*, Lush. 149, 154, to the same effect.

(*s*) L. R. 2 P. C. 525, 533.

(*t*) See *Lucey* v. *Ingram*, 6 M. & W. 302; *The Fama*, 2 W. Rob. 184.

(*u*) See *Attorney-General* v. *Case*, 3 Price, 802; *Carruthers* v. *Sidebotham*, 4 M. & S. 77; *Dodds* v. *Embleton*, 9 Dow. & Ry. 27; *Tyne Improvement Commissioners* v. *General Steam Navigation Co.*, L. R. 2 Q. B. 65; *Beilby* v. *Scott*, 7 M. & W. 93; *The Eden*, 10 Jur. 296; *The Agricola*, 2 W. Rob. at pp. 19, 20.

(*x*) *The Annapolis*, Lush. 295; and see *supra*, p. 218.

Compulsory pilot in foreign waters.

The principle of non-liability of owners for a collision caused by the negligence of a compulsory pilot has been applied even in the case of a collision in the territorial waters of a country (*y*) by the law of which owners are expressly made liable for the negligence of a compulsory pilot (*z*). Whether the compulsion is by the law of this country, or by the law of the place where the collision occurs, the owner is, in the courts of this country, equally free from liability (*a*).

Pilotage in the Suez Canal.

In the Suez Canal local regulations having the force of law oblige the shipowner to take on board and pay a charge for a "pilot." The legal position of the Suez Canal pilot is different from that of a pilot in this country. His duty is not to take charge of the ship, but to advise the master as to the navigation of the canal. The responsibility of the owner is expressly reserved by the local regulations, and for a collision which occurs when the pilot is on board, and caused by his negligence, the owners are liable (*b*).

The Guy Mannering.

A collision between *The Winston Hall* and *The Guy Mannering* was caused by the bad navigation of *The Guy Mannering* while she had on board one of the company's pilots in pursuance of Art. 4. The fault on the part of *The Guy Mannering* was that her engines were not moved astern soon enough to prevent her coming into contact with the stern of *The Winston Hall*, which was passing through the canal ahead of her, and had stopped to enable a third vessel to pass. The master of *The Guy Mannering*, before the collision, informed the pilot, who appears to

(*y*) As to the pilotage laws of some foreign countries and British colonies, see note at foot of this chapter.

(*z*) *The Halley*, L. R. 2 P. C. 193. See also *Smith* v. *Condry*, 1 How. 28, in which it was held by the Supreme Court of the United States that an American ship was not liable for a collision in British waters caused by the fault of a compulsory pilot.

(*a*) *The Hibernian*, L. R. 4 P. C. 511; *The Peerless*, Lush. 30; *The Halley*, *ubi supra*.

(*b*) *The Guy Mannering*, 7 P. D. 52, 132.

have been conducting the navigation of the ship, that his vessel was approaching too close to *The Winston Hall*, and suggested, more than once, that her engines, which had already been stopped, should be moved astern. The pilot refused to give the order, whereupon the master himself gave the order to move the engines astern, but too late to avoid the collision. Upon these facts it was held by the Court of Appeal that the owners of *The Guy Mannering* were liable for the injury done to *The Winston Hall* (*c*). The decision was based upon the ground that by the law of the country in which the collision occurred the pilot was on board merely to advise the master in matters requiring local knowledge; that the master and not the pilot had the command and charge of the vessel, and was responsible for her navigation.

In France; on the Danube.

There are similar decisions with reference to the shipowner's liability for collision caused by pilots in France (Havre) (*d*) and on the Danube (*e*).

Damage to property of Thames Conservancy by compulsory pilot.

By the Thames Conservancy Act, 1857 (*f*), it is enacted that owners of vessels navigating the Thames shall be liable for damage to property of the Conservators caused by persons belonging to or employed in their vessels. It has been held that this Act does not affect sect. 388 of the Merchant Shipping Act, 1854, and that the owners of a vessel in the Thames in charge of a compulsory pilot are not liable for damage done by the fault of the pilot to a vessel or other property belonging to the Conservators (*g*).

Damage to pier, dock or harbour works caused by compulsory pilot.

Although the shipowner is, under the Harbours, Docks, and Piers Clauses Act, 1847, liable for damage to a pier or harbour works, even when such damage is caused by his ship when in the possession and control of persons for whose acts he would not be responsible at law, it is

(*c*) *The Guy Mannering*, 7 P. D. 52; on app. *ibid.* 152.
(*d*) *The Augusta*, 6 Asp. M. C. 58, 161.
(*e*) *The Agnes Otto*, 12 P. D. 56.
(*f*) 20 & 21 Vict. c. 147 (local), s. 96.
(*g*) *Conservators of the River Thames* v. *Hall*, 3 Mar. Law Cas. O. S. 73.

expressly provided that he shall not be liable under the Act when his ship is in charge of a compulsory pilot (*h*).

Meaning of "person having the care of" a ship.

A local Act (The New Brighton Pier Act, 1864, s. 39), enacts, that if "any person having the care of" any craft should wilfully or carelessly damage the pier with such craft, her owner should be liable. The local Act incorporates the Harbours, Docks, and Piers Clauses Act, 1847; which (sect. 74) provides, in effect, that the owners of a ship that strikes and damages the pier shall be liable for the damage, but that nothing therein shall make them liable for damage by a vessel in charge of a compulsory pilot. It was held that the owners of a vessel which by the fault of her compulsory pilot damaged the New Brighton Pier were not liable for the injury to the pier; and that the words in the local Act were not the proper or necessary description of, and did not apply to, a compulsory pilot (*i*).

Compulsory pilot selected by, and in regular employment of, the shipowner.

The fact that the compulsory pilot is selected by the shipowner, and is in his regular employment, does not make him liable for a collision caused entirely by the pilot's negligence (*k*).

Licensed watermen in the Thames.

Barges in certain parts of the river Thames are required by law to be navigated by licensed watermen; but the owners of a barge, which does damage whilst in charge of a licensed waterman, are not relieved from liability (*l*).

Pilot whose employment was compulsory, but whose duty as pilot is at an end.

The presence on board of a pilot whose employment in the first instance was compulsory, but whose duty as pilot is at an end, and who is no longer in charge of the ship by compulsion of law, or otherwise than by the owners' or master's choice, does not discharge the owners. A vessel in charge of a compulsory pilot was brought up in the

(*h*) 10 & 11 Vict. c. 27, s. 74; see *River Wear Commissioners* v. *Adamson*, 1 Q. B. D. 546; 2 App. Cas. 743.

(*i*) *The Clan Gordon*, 7 P. D. 190.

(*k*) *The Batavier*, 2 W. Rob. 407; *The Hibernian*, L. R. 4 P. C. 511; the same was held in a case in the Ad. Div. 14th Dec. 1887.

(*l*) *Martin* v. *Temperley*, 4 Q. B. 298; see 7 & 8 Geo. 4, c. 74 (local).

Mersey in an improper berth, and lay there from the 27th to the 29th of October, the pilot remaining on board. On the night of the 29th she was in collision with another ship to which she had given a foul berth. It was held that it was the master's duty to have shifted his berth between the 27th and the 29th, and that the owners were liable (*m*). But compulsory pilotage is not determined by a temporarily bringing up; it continues until the vessel is finally moored in the dock or berth to which she is bound (*n*).

Employment of pilot compulsory in first instance, though no compulsion to take a pilot at the place of collision.

Owners are exempt from liability in some cases where the collision is caused by a qualified pilot in charge of the ship, although at the spot where the collision occurs there is no compulsion to take a pilot on board. A vessel bound to London took a London pilot off Dungeness, where his employment was compulsory. A collision occurred by the pilot's fault on the voyage up the river at a spot within the port of London but short of the ship's destination. It was held that, assuming the ship could not have been compelled to take on board a pilot at the place where the collision occurred (*o*), the shipowners were not liable for the collision. The engagement of the pilot having been, in the first instance, compulsory, and the right and duty of the pilot under that engagement being to navigate the ship to her destination, it was held that the relation of master and servant never arose between the owners and the pilot so as to make the owners liable for the pilot's acts (*p*).

(*m*) *The Woburn Abbey*, 3 Mar. Law Cas. O. S. 240. This case was decided upon the words of the local Act. In *The Christiana*, 7 Moo. P. C. C. 160 (under 6 Geo. 4, c. 125, s. 55), it was said by the Privy Council (though the dictum was not necessary for the decision of the case) that a pilot on board under somewhat similar circumstances remained in charge of the ship. See also the case next stated in the text. In America (*The Lotty*, Olcott, Adm. 329) it was held that the owners were liable for improper moorings twelve hours after the pilot had brought the ship up.

(*n*) *The Rigborgs Minde*, 8 P. D. 132, 135.

(*o*) She belonged to the port of London, and therefore may have been exempt; see *infra*, p. 260.

(*p*) *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.*, L. R. 3 Ex. 330; 4 Ex. 238.

Collision whilst lying in Liverpool river with pilot on board.

A ship, being obliged by law to be navigated by a pilot when "proceeding to sea," left the Liverpool docks in charge of a pilot. Owing to unfavourable weather she was brought up in the river. It was held that the owners were not liable for a collision caused by the pilot's negligence whilst the ship was lying in the river (*q*).

A vessel, inward bound, was brought up in the river Mersey by a compulsory pilot preparatory to docking. The pilot remained on board, and in charge, receiving daily wages under the local Pilotage Act. It was held that the owners were not liable for damage done by her whilst so lying at anchor (*q*).

This case must be distinguished from *The Cachapool* (*r*), a decision under the same (Liverpool) Act. A vessel came out of dock in charge of a compulsory pilot, intending to go to sea the next day. She was brought up in the river, and during the night an accident happened to her main-yard, which it became necessary to repair before she went to sea. The next day a collision occurred. It was held that the ship was not proceeding to sea within the meaning of the Act, and that the owners were liable notwithstanding the presence of the pilot on board.

Change of pilots.

Where pilotage is compulsory for an inward-bound ship, it does not cease to be compulsory by reason of a change of pilots during the pilotage and before the vessel arrives at her destination. Thus where a vessel inward bound to the Prince's Dock, Hull, took a pilot on board at sea, by whom she was brought up the river to the Island Pier, and then was placed in charge of another licensed pilot, by whose fault a collision occurred in the Humber Dock, it was held that the owners were not liable (*s*).

(*q*) *The City of Cambridge, Wood* v. *Smith*, L. R. 4 A. & E. 161; *ibid.* 5 P. C. 451; *The Princeton*, 3 P. D. 90; *The Montreal*, 1 Sp. 154, note. These decisions were under the local Act. For other decisions under this Act, see below, p. 269.

(*r*) 7 P. D. 217.

(*s*) *The Rigborgs Minde*, 8 P. D. 132. In *The Challenge*, Ad. Div. 16th Dec. 1887, Butt, J., was of opinion that a sea pilot taking his

Failure to stand by when the ship is in charge of a compulsory pilot.

In every case of collision it is the duty of the master of each ship to "stand by" and assist the other; and not the less so because at the time of the collision his ship is in charge of a compulsory pilot. The law is express that, if he fails to do so, his ship "shall be deemed to be in fault." But, notwithstanding the terms of the statute, it seems that the owners would not be liable for the collision, if it were, in fact, caused entirely by the compulsory pilot (*t*).

Fault of compulsory pilot affects the ship for certain purposes.

The owner of a ship which by the fault of her compulsory pilot damages another, and, at the same time, receives injury herself, may recover half his loss from the other ship, if she is also in fault. But the fault of the pilot so far affects him that he cannot recover more than half his loss in such a case (*u*). And, where the other ship is also in fault, it is the rule of the Admiralty Division, and of the Court of Appeal, not to give costs to either side (*x*).

Collision whilst pilot below.

Where a collision occurred when the pilot was unavoidably below for a few minutes, after he had given the course, and left the deck in charge of one of the ship's officers, it was held that the owners were liable for a collision for which the ship was in fault (*y*).

Proof required that the negligence causing the loss was the negligence of the pilot.

Where a *primâ facie* case of negligence is established against a ship, to make the defence of "compulsory pilot" good, it must either be proved affirmatively that the negligence causing the collision was the negligence of the pilot (*z*); or there must be proof of circumstances from which the Court will infer negligence on the part of the

ship to a buoy in the river (Thames), above the point at which he would usually have handed her over to the river pilot, was "compulsory" up to the buoy.

(*t*) See *The Queen*, L. R. 2 A. & E. 354. This case was decided under 25 & 26 Vict. c. 63, s. 33. The decision would, it is submitted, be the same in a similar case under the present Act, 36 & 37 Vict. c. 85, s. 16; see *supra*, p. 60.

(*u*) See *The Hector*, 8 P. D. 218; *Dudman* v. *Dublin Port, &c. Board*, Ir. Rep. 7 C. L. 518; see also *Spaight* v. *Tedcastle*, 6 App. Cas. 217; *The Energy*, L. R. 3 A. & E. 48.

(*x*) *The Rigborgs Minde*, 8 P. D. 132, 136.

(*y*) *The Mobile*, Swab. Adm. 69; on app. *ibid.* 127. As to the duty of the master to be on deck, see *The Obey*, L. R. 1 A. & E. 102.

(*z*) *Clyde Navigation Co.* v. *Barclay*, 1 App. Cas. 790.

pilot. Where a collision was caused by the helm being improperly put to starboard, it was in one case held that, to relieve the owners from liability, it must be proved that the order to put the helm to starboard was given by the pilot (*a*). But it would seem that where the pilot is in charge, express proof of the order, which caused the collision, having been given by the pilot would not in all cases be necessary (*b*).

In *The Carrier Dove* (*c*), a ship in the Mersey was getting her anchor in heavy weather with the assistance of a tug ahead. She was struck by a squall, and driven on a ship at anchor. It was held by the Privy Council that the state of the weather and other circumstances made it imprudent and dangerous for her to get under way. The ship was in charge of a compulsory pilot; but, in the absence of proof that she was got under way by his orders, the owners were held liable.

Where a ship in tow ran into and damaged a pier in the Thames in consequence of the tug, without orders from the compulsory pilot in charge of the tow, improperly altering her course, it was held that the tow was liable (*d*).

A vessel was being towed from one dock to another at night when it was imprudent for her to be under way. The owners were held liable, notwithstanding the presence on board of a licensed pilot. It was said by the Court that the case differed from that of a ship in tow in broad daylight, when the tug is bound to obey the orders of the pilot (*e*).

Owners liable where there is negligence on the part of the ship's crew or officers.

It is only where the collision is caused entirely by the fault of the pilot that owners are exempt from liability. If any fault or negligence on the part of the owners, or

(*a*) *The Schwalbe*, Lush. 239.
(*b*) *The Winston*, 8 P. D. 176.
(*c*) Brown & Lush. 113.
(*d*) *The Sinquasi*, 5 P. D. 241.
(*e*) *The Borussia*, Swab. Adm. 94. It is not clear whether the Court considered the pilotage compulsory. From *The Maria*, L. R. 1 A. & E. 358, it seems that under the local Act the employment of the pilot was not compulsory.

on the part of their agents, or the officers or crew of the ship, has contributed to the loss, they, as well as the pilot, are responsible (*f*). And the owners are responsible for the whole of the loss, though it was caused in part by the fault of the pilot (*g*).

Burden of proof as to negligence.

There has been some confusion as to the burden of proof in such cases; and until recently the law has been unsettled. It was at one time held that where a compulsory pilot was in charge, or even on board, the owners were *primâ facie* exempted from liability (*h*). Then it was held that, in order to make good their claim to exemption, the owners must prove, not only that the collision was caused by the pilot's fault, but that there was no contributory negligence on the part of the crew (*i*). It is now settled that the owners are not required to prove absence of contributory negligence, but that, under certain circumstances, it will be presumed. If the defendant owners prove fault on the part of the pilot sufficient to cause, and in fact causing, the collision, in the absence of proof by the plaintiffs of contributory negligence on the part of the crew, it is held that the defendants have satisfied the condition upon which their exemption depends, and they will not be called on to adduce further proof of a negative character to exclude the mere possibility of contributory fault. But if it appears that the owners, or their servants, have committed acts, or been guilty of omissions, which might have contributed to the collision, then it lies on them to prove that those acts or omissions did not in any degree contribute to the collision.

These points were decided in *Clyde Navigation Co.* v. *Barclay* (*j*), the effect of which case is thus stated by Lord

(*f*) *The Mobile*, Swab. Adm. 127; *The Diana*, 1 W. Rob. 131; 4 Moo. P. C. C. 11.

(*g*) See *The Diana*, *Stuart* v. *Ironmonger*, 4 Moo. P. C. C. 11.

(*h*) *The Vernon*, 1 W. Rob. 316; *Bennet* v. *Moita*, 7 Taunt. 258; *The Christiana*, 2 Hag. Ad. 183.

(*i*) *The Iona*, L. R. 1 P. C. 426; and see *The Velasquez*, L. R. 1 P. C. 494 (a case of doubtful authority).

(*j*) 1 App. Cas. 790. In this case the rule laid down in *The Iona*,

Esher, M. R. :—" It amounts, in my opinion, to this—that where the plaintiffs make a *primâ facie* case, and the answer is that the defendants are exempt from liability on the ground of compulsory pilotage, and they give evidence which *primâ facie* proves that the accident was the fault of a pilot who was on board by compulsion of law, the burden of proof is then shifted back on to the plaintiffs if they allege that the defendants are guilty of some other act of negligence. This seems to be the meaning of that case. It does not alter the general and long accepted rules as to the burden of proof . . ." (*k*).

The principle as to the burden of proof in these cases is clear. The plaintiff, in order to recover damages, must prove fault on the part of those on board the defendant ship for which her owners are liable. *Primâ facie* the owners are liable for the fault of those in charge of their ship; but they are not liable for the fault of a compulsory pilot. Upon proof, therefore, by the defendants that their ship was in charge of a compulsory pilot, their *primâ facie* liability is rebutted. To enable the plaintiffs to recover in such a case, further proof is necessary on their part that the collision was caused partly by negligence of persons on board the defendant ship, for whose negligence her owners are liable. In the absence of evidence upon the point, such contributory or additional negligence will not be inferred (*l*).

Course to be pursued where party relying upon defence of compulsory pilot is unwilling to call pilot as witness.

Where the party relying upon the defence of compulsory pilotage is unwilling to call the pilot as a witness, the proper course appears to be for him to subpœna the pilot to produce his licence, and to be provided with evidence from the licensing authority identifying him as the person to whom the licence produced was granted, and with

L. R. 1 P. C. 426, was dissented from; the former case was followed in *The Daioz*, 3 Asp. Mar. Law Cas. 477; *The Marathon*, 48 L. J. Ad. 17; *The Indus*, 12 P. D. 46.

(*k*) *Per* Lord Esher, M. R., *The Indus*, 12 P. D. 46, 49.

(*l*) See *The Winston*, 8 P. D. 176.

evidence from the ship identifying him as the person who was in charge of her. The licence usually has to be renewed periodically, and it must be proved that the licence produced had been renewed or was a valid licence at the date of the collision. The date of renewal appears upon the face of a Trinity House licence.

Qualified pilot superseding unqualified pilot.

A qualified pilot is empowered by law, in pilotage waters, to supersede an unqualified pilot who is acting in charge of a ship, whether the ship is subject to compulsory pilotage or not (*m*), and whether at the place where he meets her pilotage is compulsory or not (*n*). It has not been decided whether the owners are liable for a collision caused by the fault of a qualified pilot, who has superseded an unqualified pilot, under such circumstances. The statutory exemption (*o*) probably does not apply to such a case; but, apart from the statute, it seems doubtful whether owners could be held liable for the acts of a pilot who takes charge of their ship under the authority of the law, not by their choice or as their servant.

Owners liable for fault of a waterman engaged at request of pilot.

Where the master of a French ship in the Thames, at the pilot's request, engaged a waterman to take the helm, and a collision occurred by the fault of the waterman in not carrying out the pilot's orders, it was held that the waterman was in the employment of the owners, and that they were liable (*p*).

Exemption of owners in case of compulsory pilotage will not be extended.

The rule that owners are not liable for damage done by their ship when in charge of a compulsory pilot, and by his fault, has been said to take away a remedy from the sufferer, and the Courts have shown some unwillingness in applying it (*q*). A defendant who succeeds only upon

(*m*) 17 & 18 Vict. c. 104, s. 360. It seems that the master of a tug employed to tow only, and not to pilot the ship, could not be superseded by a qualified pilot under the former Act; see *Beilby* v. *Scott*, 7 M. & W. 93, decided under 6 Geo. 4, c. 125.

(*n*) 52 & 53 Vict. c. 68, s. 5.

(*o*) 17 & 18 Vict. c. 104, s. 388.

(*p*) *The General de Caen*, Swab. Ad. 9.

(*q*) In *The Halley*, L. R. 2 A. & E. 3, 15, Sir R. Phillimore said that the law, by which owners of a wrong-doing ship are not liable for

the defence of compulsory pilotage is required in some cases to bear his own costs (*r*).

Whether fault of compulsory pilot is contributory negligence such as to prevent owners from recovering.

In a case (*s*) before the House of Lords the question was raised, but not decided, whether the owner of a ship in tow and in charge of a compulsory pilot is prevented by the doctrine of contributory negligence from recovering from the owners of the tug for damage to the tow, caused partly by the fault of the pilot in charge of the tow, and partly by the fault of those in charge of the tug. It would seem that in such a case the negligence of the pilot, being that of a person for whose acts the owners are not responsible, is immaterial, and cannot prejudice the right of the shipowners to recover against the wrongdoer (*t*).

Liability when tug is under orders of compulsory pilot in charge of tow.

The effect of the rule as to the non-liability of the shipowners for a collision caused by the fault of a compulsory pilot, in the case of a collision between a tug or her tow and a third ship, is considered in another chapter (*u*). It will be sufficient here to state that for a collision between the tow and a third ship, caused entirely by the fault of a compulsory pilot on board and in charge of the tow, the tow and her owners are free from liability (*x*). As regards a collision between the tug and a third ship, where the tow is in charge of a compulsory pilot, the law is not so clear. The general rule being, that those on board the tug are by the terms of the towage contract bound to obey the orders of the person in charge of the tow, it would seem that neither the tug nor the tow, nor the owners of either

the fault of a compulsory pilot, is "fruitful in injustice"; but see the observations of the L.JJ., S. C. on app., L. R. 2 P. C. 193. The question rather is as to the justice of the law which makes one man liable for the fault of another man.

(*r*) See below, p. 331.

(*s*) *Speight* v. *Tedcastle*, 6 App. Cas. 217.

(*t*) See *per* Lord Blackburn, 6 App. Cas. 217, 222; questioning the decision in *The Energy*, L. R. 3 A. & E. 48. See also *The Hector*, 8 P. D. 218, *supra*, p. 142.

(*u*) *Supra*, p. 193.

(*x*) *The Ocean Wave*, L. R. 3 P. C. 205. The law is the same as regards damage by a ship in tow to a pier or harbour works; see 10 & 11 Vict. c. 17, s. 74, *supra*, p. 73.

of them, should be liable for a collision between the tug or the tow and a third ship caused by those on board either the tug or the tow carrying out an improper order given by a compulsory pilot in charge of the tow. But it has been held in Admiralty that the tug is liable in such a case (*y*). And a ship in tow has been held liable for damage caused by her striking a pier in consequence of an improper alteration in the course of the tug made without orders from the compulsory pilot in charge of the tow, but under circumstances which required her to act without waiting for orders from the tow (*z*).

Whether as between tug and tow compulsory pilot's negligence may be contributory.

In the case (*a*) in the House of Lords cited above, it seems to have been the opinion of Lords Selborne and Blackburn that the owners of a ship in tow and in charge of a compulsory pilot would not be prevented from recovering from the tug and her owners damages for injuries sustained by the tow in consequence of negligence on the part of those on board the tug, and also on the part of the pilot; in other words, that the negligence of the pilot was not contributory negligence such as to prevent their recovering damages against the tug and her owners.

Owners liable for deficiency of ship or equipment.

If, through the owner's negligence, a ship is deficient in hull or equipment, and a collision occurs in consequence, her owners are liable although their ship is in charge of a compulsory pilot (*b*). Thus, owners have been held liable for the insufficiency of ground tackle (*c*). So if the vessel does not carry the proper lights (*d*), or will not steer (*e*), or if the crew is insufficient or incapable (*f*),

(*y*) *The Mary*, 5 P. D. 14; *supra*, p. 189.

(*z*) *The Sinquasi*, 5 P. D. 241; *supra*, p. 187.

(*a*) *Spaight* v. *Tedcastle*, 6 App. Cas. 217, *supra*, p. 241. Cf. *The Bernina*, 13 App. Cas. 1.

(*b*) *The Christiana*, *Hammond* v. *Rogers*, 7 Moo. P. C. C. 160; *infra*, p. 244.

(*c*) *The Massachusetts*, 1 W. Rob. 371.

(*d*) *The Ripon*, 10 P. D. 65.

(*e*) *The Livia*, 1 Asp. Mar. Law Cas. 204; *The Peru*, 1 Pritch. Ad. Dig. 3rd ed. p. 1412; *The Warkworth*, 9 P. D. 20, 145.

(*f*) *The General de Caen*, Swab. Ad. 9; *The Hope*, 1 W. Rob. 154; and see below, p. 246.

or if the tug employed by the master is not of sufficient power (*g*), "compulsory pilotage" would be no defence.

But it is not necessary that the ship should be perfect in every respect, provided that, with ordinary care, she can be navigated with safety to other vessels. Where a vessel in collision with another was not in the best of trim, it was argued that the owners were liable, although she was in charge of a compulsory pilot. It was held by Dr. Lushington that the owners were relieved from liability (*h*). He said: "If she was in ordinary safe trim, then, although she might be in handier trim, and although the trim of the ship in fact contributed to the collision, they (the owners) are not responsible." In a case in Ireland where the vessel was unhandy owing to her being too much down by the stern, the owners were held liable, for that reason, and also, it seems, on the ground that the pilot was not informed of the state of the ship's trim (*i*).

Relative positions, authority and duties of master and pilot.

Having regard to the rule of law which throws the liability for a collision caused wholly or in part by the fault of the master or crew upon the shipowner, and that for a collision caused wholly by the fault of the pilot upon the pilot alone, it is of importance that their respective duties should be clearly defined. The primary rule is that the pilot supersedes the master in all matters connected with the command and navigation of the ship. His authority is supreme, his orders must be implicitly obeyed, and any negligence in carrying them out, or interference with him in his duties, will make the owners liable in case of collision. "The duties of the master and the pilot are in many respects clearly defined. Although the pilot has charge of the ship, the owners are most clearly responsible to third persons for the sufficiency of the ship and her equipments, the competency of the master and crew, and

(*g*) *The Ocean Wave, Marshall* v. *Moran*, L. R. 3 P. C. 205; *The Belgic*, 2 P. D. 57, note; and see *The Julia*, Lush. 224.

(*h*) *The Argo*, Swab. 462.

(*i*) *The Meteor*, Ir. R., 9 Eq. 567.

their obedience to the orders of the pilot in everything that concerns his duty; and under ordinary circumstances we think that his commands are to be implicitly obeyed. To him belongs the whole conduct of the navigation of the ship, to the safety of which it is important that the chief direction should be vested in one only" (*k*).

Pilot's duties.

There have been numerous decisions as to what are matters connected with the navigation of the ship to which it is the duty of the pilot to attend. It has been held to be the duty of the pilot in bad weather to decide whether to get under way or to lay fast (*l*); to decide upon the time, place, and manner of turning a ship before going into dock (*m*); to give orders as to setting or taking in head sail when turning a ship in the river (*n*); to regulate the ship's course and speed by check ropes and warps when docking (*o*). It is the exclusive duty of the pilot to give the orders to the helm (*p*); to decide whether to comply with the statutory rule of the road or not (*q*); to decide upon the proper time and place of bringing up (*r*); and as to the proper mode of carrying the anchor, before letting go (*s*); to see that the ship rides with a proper scope of cable out; to tend her whilst swinging; to let go a second anchor if necessary; to manœuvre her if she parts from her anchor (*t*); and to shift his berth when

(*k*) *Per* Parke, B., in *The Christiana, Hammond* v. *Rogers*, 7 Moo. P. C. C. 160, 171; approved in *The City of Cambridge, Wood* v. *Smith*, L. R. 5 P. C. 451, 457.

(*l*) *The Carrier Dove*, Br. & Lush. 113; *The Lochlibo*, 7 Moo. P. C. C. 427. There appears to be some doubt whether it is the exclusive duty of the pilot to decide whether to get under way in bad weather or not; see *The Girolamo*, 3 Hag. 169; *The Borussia*, Swab. 94; *The Ocean Wave*, L. R. 3 P. C. 205, 209; *The Oakfield*, 11 P. D. 34; and see *infra*, pp. 245, 250, 255.

(*m*) *The Ocean Wave*, L. R. 3 P. C. 205.

(*n*) *The Ocean Wave, ubi supra.*

(*o*) *The Rigborgs Minde*, 8 P. D. 132; but see *The Cynthia*, 2 P D. 52; *infra*, p. 249.

(*p*) *The Schwalbe*, Lush. 239; *The Winston*, 8 P. D. 176; 9 P. D. 85.

(*q*) *The Argo*, Swab. 462.

(*r*) *The Agricola*, 2 W. Rob. 10; *The George*, 4 Not. of Cas. 161; *The Christiana*, 7 Moo. P. C. C. 160, 172; *The Lochlibo, ibid.* 427; 3 W. Rob. 310; *The Rhosina*, 10 P. D. 131.

(*s*) *The Gipsey King*, 2 W. Rob. 537; *The Rigborgs Minde*, 8 P. D. 132, 136; but see *infra*, p. 246, as to the duty of the crew to see that the anchor is clear.

(*t*) *The City of Cambridge, Wood*

circumstances occur which make it necessary in order to avoid collision (*u*). He decides as to the rate of speed, and the canvas to carry (*x*); whether to run through a crowded roadstead at night or to bring up (*y*). When brought up he must keep an eye on the weather, and be ready for a change without relying entirely upon the look-out for a report (*z*).

It is for the pilot to decide upon the time, place, and manner of turning a ship, when docking (*a*). The omission to set some head sail, to help the ship round, was held by the Privy Council to be the fault of the pilot, and not of the master or crew (*b*). If a tug is in attendance and the safety of the ship requires it, it is the duty of the pilot to employ the tug (*c*). And it seems that the pilot is responsible if the ship is got under way in weather when it is imprudent to move (*d*). This however is not clear, for, in some cases, it has been said that the master is responsible for being under way in improper weather (*e*). "There might be such a fog as to make it a fault on (the master's) part to allow his vessel to be moved. If there was a clear and plain prospect of danger the master could not throw the whole blame on the pilot if he order the vessel to get under way" (*f*).

Though the pilot, it seems, has no power to engage a tug, it is his duty, when the situation is critical and the safety of the ship requires it, to advise the master to do

v. *Smith*, L. R. 5 P. C. 451; *The Northampton*, 1 Sp. E. & A. 152; *The Princeton*, 3 P. D. 90.

(*u*) As where he has notice that he is in the way of a launch: *The Cachapool*, 7 P. D. 217.

(*x*) *The Calabar*, L. R. 2 P. C. 238; *The Maria*, 1 W. Rob. 95, 110; *The Julia*, Lush. 224; *The Batavier*, 1 Sp. E. & A. 378, 383; 9 Moo. P. C. C. 286; *The Lochlibo*, *ubi supra*.

(*y*) *The Lochlibo*, *ubi supra*.

(*z*) *The Princeton*, 3 P. D. 90.

(*a*) *The Ocean Wave*, *Marshall* v. *Moran*, L. R. 3 P. C. 205.

(*b*) *The Ocean Wave*, *ubi supra*.

(*c*) *The Peerless*, 13 Moo. P. C. C. 484; and see *The Julia*, Lush. 224.

(*d*) *The Carrier Dove*, Br. & Lush. 113; *The Lochlibo*, 7 Moo. P. C. C. 427.

(*e*) See *The Ocean Wave*, *ubi supra*; *The Girolamo*, 3 Hag. Ad. 169; *infra*, p. 250; *The Borussia*, Swab. Ad. 94; and see *supra*, p. 244.

(*f*) *Per* Sir J. Hannen, *The Oakfield*, 11 P. D. 34, 35.

so (*g*). When a tug is engaged it is his exclusive duty to give orders as to taking on board (*h*) and casting off (*i*) the tow-rope, and, under ordinary circumstances, to direct the course and regulate the speed of the tug as well as that of the ship in tow (*k*).

Duties of master and crew.

Although the pilot's authority is paramount, the master is not free from responsibility. In *The Batavier* (*l*), Dr. Lushington said: "There are many cases in which I should hold that, notwithstanding the pilot has charge, it is the duty of the master to prevent accident, and not to abandon the vessel entirely to the pilot; but that there are certain duties he has to discharge, notwithstanding there is a pilot on board, for the benefit of the owners."

The following are duties of the master and crew for which the owners are held responsible, notwithstanding the presence on board of a compulsory pilot. The master and crew must keep a good look-out, and keep the pilot informed of the position, movements of, and possible danger to other ships (*m*); they must have the anchor clear, and ready to let go, when the pilot gives the order (*n*); the master is responsible for the sufficiency and power of a tug employed for ordinary towage service (*o*), and for the employment of a tug where the assistance of a tug is necessary (*p*); and although not bound to be always on deck (*q*), he is generally responsible for the

(*g*) *The Julia*, Lush. 224.
(*h*) *The Julia*, *ubi supra*.
(*i*) *The Energy*, L. R. 3 A. & E. 48; *Spaight* v. *Tedcastle*, 6 App. Cas. 217; *Clyde Navigation Co.* v. *Barclay*, 1 App. Cas. 790.
(*k*) *The Ocean Wave*, L. R. 3 P. C. 205; *The Julia*, *ubi supra*; *The Energy*, *ubi supra*. See, however, *The Sinquasi*, 5 P. D. 241; and see *supra*, p. 193.
(*l*) 1 Sp. E. & A. 378, 383; S. C. on app. nom. *Netherlands Steamboat Co.* v. *Styles*, 9 Moo. P. C. C. 286.
(*m*) *The Batavier*, *ubi supra*; *The Diana*, 1 W. Rob. 131; 4 Moo. P. C. C. 11: *The Velasquez*, L. R. 1 P. C. 494; *The Julia*, Lush. 224; *The Atlas*, 2 W. Rob. 502; *The Minna*, L. R. 2 A. & E. 97; *The Queen*, *ibid.* 354; *The Iona*, L. R. 1 P. C. 426.
(*n*) *The General Parkhill* and *The Centurion*, 1 Pritch. Ad. Dig. 172; and see *The Peerless*, 13 Moo. P. C. C. 484; *The Rigborgs Minde*, 8 P. D. 132, 136; but see *The Rhosina*, 10 P. D. 24; *ibid.* p. 131.
(*o*) *The Ocean Wave*, *ubi supra*.
(*p*) *The Julia*, *ubi supra*.
(*q*) See *The Obey*, L. R. 1 A. & E. 102; and see *Spaight* v. *Tedcastle*, 6 App. Cas. 217, 226.

ordinary work of the ship being properly carried on, and usual precautions being taken without express order from the pilot (*r*). For the trim of the ship, and generally for her sufficiency as regards tackle and equipment for ordinary purposes of navigation, the owner or the master is responsible (*s*).

If the pilot is below, or for some other reason is not in charge of the deck at the time of collision, the owners would, it is conceived, be liable (*t*).

Where a ship is in tow of a tug, we have seen that, as a general rule, the tug is bound to obey the orders of the pilot in charge of the tow; but in the absence of orders from the pilot, it is the duty of those in charge of the tug to keep clear of other ships, and for a collision between the tow and a third ship caused by an improper alteration in the course of the tug made without orders from the pilot, the owners of the tow are liable (*u*).

A tug in the Mersey got orders from the compulsory pilot in charge of the ship in tow to "slew the ship round" preparatory to docking. The tug executed the manœuvre in an improper manner, by towing the ship across the bows and foul of another at anchor. The owners of the ship in tow were held liable (*x*).

A ship was in collision with another coming out of dock. The latter had not been reported by the look-out. It was held that the duty of the look-out being to watch for and report vessels in the river, it was not negligence in them not to have reported the vessel in dock, and the vessel being in charge of a compulsory pilot, the owners were held free from liability (*y*).

A ship in charge of a compulsory pilot, having been in

(*r*) *The Christiana, infra; The Sinquasi*, 5 P. D. 241; and see cases cited *infra*, p. 246.
(*s*) *Supra*, p. 242.
(*t*) See *The Gordon*, 18 Lower Canada Jurist, 109.
(*u*) *The Sinquasi*, 5 P. D. 241.
(*x*) *The Locksley Hall*, Ad. Div. 28th March, 1887.
(*y*) *The Calabar*, L. R. 2 P. C. 238.

collision with another, drove foul of a third. It was held that the owners were liable in consequence of the negligence of the master and crew in the following particulars: in not veering out more chain to bring the ship up; in not bending a line on to a tow-rope, so as to enable a tug, which came alongside the ship sued, to keep her clear of the other ship; and in not getting sail on the ship (*z*).

Not sending down yards in heavy weather.

A ship in charge of a compulsory pilot was riding in the Downs in heavy weather, and drove from her anchors on board another ship. If some of her gear aloft had been sent down, she might have ridden in safety and escaped collision. It was held by the Privy Council that there was contributory negligence on the part of the master in not sending down the yards, and that the owners were liable. Parke, B., in delivering the judgment of the Court, said:—"The step being one which every master, according to ordinary rules of navigation, ought to have taken in every open roadstead, where many vessels were lying, and in blowing weather, that duty was not exclusively the pilot's, but that of the master also. And if the pilot had given express orders to the master not to send down topmasts, &c., we do not say that the owners might not have been excused from responsibility for the consequences of that omission" (*a*).

Owner liable for improper execution of pilot's orders.

The owners are responsible for the pilot's orders being promptly and efficiently carried out. If the helm is not shifted (*b*), the anchor let go (*c*), the engines stopped (*d*), or the tow-rope cast off (*e*), promptly at the pilot's order, and a collision ensues, the owners are liable. It is the master's duty to repeat the pilot's orders (*f*), and to see that they

(*z*) *The Annapolis* and *The Golden Light*, Lush. 355.

(*a*) *The Christiana, Hammond* v. *Rogers*, 7 Moo. P. C. C. 160, 173.

(*b*) *The Lochlibo*, 7 Moo. P. C. C. 427; *The Julia*, Lush. 224; *The Indus*, 12 P. D. 46, 48.

(*c*) *The Atlas*, 2 W. Rob. 502; *The Peerless*, 13 Moo. P. C. C. 484; *The Rigborgs Minde*, 8 P. D. 132.

(*d*) *The Ripon*, 6 Not. of Cas. 245.

(*e*) *The Energy*, L. R. 3 A. & E. 48.

(*f*) *The Admiral Boxer*, Swab. Ad. 193; *The Lochlibo*, 3 W. Rob. 310, 328.

are carried out. If, in carrying them out, ordinary prudence and seamanship require a particular precaution to be taken, it will be held to be negligence in the master if the precaution is omitted. Thus, the omission to run out a warp or check line when docking (*g*), or to cut a lanyard which holds two ships together when in collision (*h*), is held negligence in the master or crew.

Interference by master with the pilot.

In case of the pilot's intoxication or manifest incapacity, it is the duty of the master to take charge of the ship (*i*). And if an emergency or sudden danger arises, when the pilot is not at hand, or which he does not foresee, the master would be justified in giving, and it seems that it would be his duty to give, an order necessary for the ship's safety (*k*). But interference with the pilot's duties is justified only by urgent necessity. "I have said on many occasions, and my ruling has been confirmed by the Judicial Committee in the case of *Hammond* v. *Rogers* (*l*), that a master has no right to interfere with the pilot, except in cases of the pilot's intoxication or manifest incapacity, or in cases of danger which the pilot does not foresee, or in cases of great necessity" (*m*). Care must be taken not to interfere with the pilot unnecessarily; for if a collision occurs in consequence of improper interference with the pilot, the owners will be liable. "It would be a most dangerous doctrine to hold, except under the most extraordinary circumstances, that the master could be justified in interfering with the pilot in his proper vocation. If the two authorities could so clash, the danger would be materially augmented, and the interests of the owner,

(*g*) *The Cynthia*, 2 P. D. 52; see, however, *The Rigborgs Minde*, 8 P. D. 132, where the duty to have a check line astern whilst warping through a dock was held to lie on the pilot.

(*h*) *The Massachusetts*, 1 W. Rob. 371.

(*i*) *The Christiana*, *Hammond* v. *Rogers*, 7 Moo. P. C. C. 160, 172; *The Lochlibo*, *Pollok* v. *McAlpin*, *ib.* 427; *The Hibernia*, 4 Jur. N. S. 1244.

(*k*) *The City of Cambridge*, *Wood* v. *Smith*, L. R. 5 P. C. 451, 459; *The Argo*, Swab. Ad. 462.

(*l*) *The Christiana*, 7 Moo. P. C. C. 160, 171.

(*m*) *Per* Dr. Lushington in *The Argo*, Swab. 462, 464.

which are now protected by the general principles of law, and specific enactments, from liability for the acts of the pilot, would be most severely prejudiced" (*n*).

Whether master or pilot responsible for being under way in too dense fog.

In *The Girolamo* (*o*), a ship, with a pilot on board, was under way in the Thames in a fog so dense that she could not proceed without danger to other craft. Sir J. Nicholl expressed an opinion that, under such circumstances, it was the duty of the master to take the charge of the ship out of the pilot's hands, and to bring her up. In other cases, however, it has been doubted whether the master would be justified in exercising his own discretion in such a case; and the better opinion seems to be that the pilot is alone responsible for bringing the ship up when necessary (*p*).

Navigating on wrong side of river.

It has been held that when the pilot was taking a ship on the wrong side of the river, in direct violation of the law, the master was not in fault for not interfering, and that he would not have been justified in doing so (*q*). In *The Julia*, Lord Kingsdown said that for a master to give to the man at the wheel a different order from that given by the pilot, while a tug was coming alongside to take the tow-line on board, was "misconduct in the master and disobedience to the orders of the pilot" (*r*). So, if the master, against the pilot's orders, takes on board and makes fast the tow-line, he and his employers, the shipowners, will be liable for a collision thereby occasioned (*s*).

Suggestions to pilot.

It is not improper interference on the part of the master to make suggestions to the pilot or to offer him advice (*t*). And, in case of a manifest danger, it is the duty of the master to interfere to this extent. In a salvage case, where

(*n*) *Per* Dr. Lushington in *The Maria*, 1 W. Rob. 95, 110. See also *The Hibernia*, 4 Jur. N. S. 1244; *The Peerless*, Lush. 30; *The Duke of Sussex*, *supra*, p. 198, as to the danger of clashing authorities.

(*o*) 3 Hag. Ad. 169.

(*p*) *The North American* and *The Wild Rose*, 2 Mar. Law Cas. O. S. 319; *The Lochlibo*, 3 W. Rob. 310, 320; 7 Moo. P. C. C. 427; and see *supra*, p. 244.

(*q*) *The Argo*, Swab. Ad. 462. But *aliter* as to lights; *The Ripon*, 10 P. D. 65.

(*r*) Lush. 224; and see *The Lochlibo*, *ubi supra*.

(*s*) *The Julia*, *ubi supra*.

(*t*) *The Lochlibo*, *ubi supra*; *The Oakfield*, 11 P. D. 34.

a ship in charge of a pilot was in tow, and the course given to the tug by the pilot was clearly dangerous and wrong, Lord Campbell, in delivering the opinion of the Privy Council, said: "The master of the tug, watching the course the licensed pilot pursues, if he finds that this course will lead the vessel into danger, is bound to interfere and make a communication to the master of the ship, instead of making himself instrumental to the destruction of life and property" (*u*). And we have seen that, under some circumstances, it is the duty of the master of a tug towing a ship which is in charge of a pilot, to alter his course for the purpose of keeping clear of other craft, without waiting for orders from the pilot (*x*).

In *The Lochlibo* (*y*), Dr. Lushington discusses at length the question, what amount of interference with the pilot in the performance of his duties will make the owners liable. An order given by the master or crew to the helm, and repeated mechanically by the pilot, amounts to "illegal interference;" but mere suggestion to, or consultation with, the pilot is not interference. Even a wrong order to the helm suggested by the master, and adopted advisedly by the pilot, is not interference on the part of the master such as to make the shipowner liable (*z*).

Duty of master to advise pilot of ship's peculiarities.

Where there is any peculiarity of the ship which makes her difficult for a stranger to handle, it is clearly the duty of the master to offer his experience and advice to a pilot who is a stranger to her (*a*).

Dock or harbour-master in charge.

In many ports the harbour or dock-master has power, by Act of Parliament, to regulate the movements, mooring, and berthing of ships. When a vessel is acting under the orders of such a person her owners are, as regards liability for damage done by her, in the same position as when she

(*u*) *The Duke of Manchester, Shersby* v. *Hibbert*, 5 Not. of Cas. 470, 476.
(*x*) *The Sinquasi*, *supra*, p. 187.
(*y*) 3 W. Rob. 310; affd. on app. 7 Moo. P. C. C. 427.
(*z*) *The Oakfield*, 11 P. D. 34.
(*a*) Cf. *The Meteor*, Ir. Rep. 9 Eq. 567; *supra*, p. 243.

is in charge of a compulsory pilot; the dock-master is not their servant, and they are not liable for damage caused by his negligence (*b*). Thus it was held that a ship, which was damaged by another falling over against her at low water, was not entitled to recover damages against the other, the latter having been berthed under the directions of the dock-master (*c*).

But in a place where vessels are required to take up their berths under the orders of a harbour-master, if, without any directions from him, a ship takes up a berth at which she is afterwards injured by another properly berthed, she cannot recover against the latter (*d*).

If ordered to do so by the dock authorities, a ship must send down her yards; and she must shift her berth, even after she has been properly moored by their order, and though she is safer where she is (*e*).

If, in carrying out the orders of the dock-master, ordinary prudence would suggest that a particular precaution should be taken, a vessel neglecting to take that precaution will be held to be in fault. Thus when a ship was being moved under the orders of a dock-master, and negligently omitted to use a check rope, her owners were held liable for damage she did to other craft in consequence (*f*).

A ship going out of dock under the orders of a dock-master was offered, and accepted, the services of the dock company's tug. Through want of power in the tug a collision occurred. The owners were held liable, there being no obligation upon them to accept the services of the tug, or on the company to supply one (*g*).

Liability of dock or

Whether the dock or harbour authority is liable for

(*b*) Cf. *The New York Packet*, 4 Low. Canada Rep. 343.

(*c*) *The Economy*, 1 Pritch. Ad. Dig. 3rd ed. 286; and see *The Bilbao*, Lush. 149.

(*d*) *The Jacob*, 1 Pr. Ad. Dig. 3rd ed. 286.

(*e*) *The Excelsior*, L. R. 2 A. & E. 268.

(*f*) *The Cynthia*, 2 P. D. 52; see also *The Excelsior*, L. R. 2 A. & E. 268.

(*g*) *The Belgic*, 2 P. D. 57, note.

injury done by a ship whilst in charge and acting under the orders of the dock or harbour-master, has not been expressly decided. In a case before the Admiralty Division (*h*), it was assumed that they would be liable for the negligence of the harbour-master; and such would seem to be the law, provided the harbour-master is acting within the scope of his employment by the harbour authority (*i*).

harbour authority for collision caused by harbour-master's negligence.

It will be convenient here to consider a subject closely connected with the law relating to compulsory pilotage; namely, the position, duty, and liability of the master, when a pilot is taken voluntarily and not by compulsion of law. In considering the shipowner's liability for collision where pilotage is compulsory, we have seen that the law assigns certain duties to the master and others to the pilot; and that, if the master interferes with the pilot in his own province, he does so at the risk of making his owner liable in case of collision. Now it is frequently the duty of a master to take a pilot (*k*) in waters where there is no compulsion of law to do so, and questions have arisen as to the scope of the master's authority and duty when a pilot is on board under such circumstances, and as to his liability, not only in respect of damages for collision, but for other matters connected with the navigation of the ship. It is important, therefore, to consider whether the position and responsibilities of the master, as defined by the Admiralty Courts in cases relating to compulsory pilotage, where the question is as to the shipowner's liability for collision, agree with the practice of seamen, and whether they are recognized by other tribunals. There is reason to think that outside the law courts nautical opinion

Position, duty, and responsibility of master when pilot is on board.

(*h*) See above, p. 100.

(*i*) See on this question *Mersey Dock Trustees* v. *Gibbs*, L. R. 1 H. L. 93; *Metcalfe* v. *Hetherington*, 11 Ex. 257; 5 H. & N. 719; *Holman* v. *Irvine Harbour Trustees*, 4 Sess. Cas. 4th Ser. 406; *Shaw, Savill, and Albion Co.* v. *Timaru Harbour Board*, 15 App. Cas. 429; *The Apollo*, 6 Asp. M. C. 356, 402.

(*k*) See *infra*, p. 257.

is by no means unanimous in assigning to the master the subordinate position in which he is placed by the Admiralty decisions.

In H.M. Navy.

First, as to the responsibilities of the captain in H.M. Navy. In Regulations of H.M. Service at Sea of the last century (*l*), is contained an article which provides that the pilot shall "have the sole charge and command of the ship;" he is to give orders for navigating the ship, which the captain is to see carried out. The captain is to remove him from his command "if he judges him to behave so ill as to bring the ship into danger." This Regulation differs considerably from that now in force. The Regulations of 1879, following the language of previous Regulations of 1806, 1808, 1833, and 1862, contain the following description of the duties and responsibilities of the captain, navigating officer, and pilot:—

Art. 940. "The captain is to order everything that relates to the navigation of the ship to be performed as the pilot shall require; but nevertheless he, and the navigating officer, are to attend particularly to his conduct; and if from his own or the navigating officer's observations, he shall have reason to believe the pilot not qualified to conduct the ship, or that he is running her into danger, the captain is to remove him from charge, and take all necessary measures for the safety of the ship, noting the time of the pilot being so removed in the ship's log-book; and if the ship be at any time damaged through the ignorance or negligence of the pilot when a common degree of attention on the part of the captain and navigating officer would have prevented the disaster, those officers will be deemed to have neglected their duty. This Article is equally applicable to the case of a ship in charge of a Queen's harbour-master or the master attendant of a dockyard."

Under this article it is held by the Lords of the Admiralty that, if a ship gets ashore on a well-known sand in

(*l*) For 1790; see MSS. in the Admiralty Library at Whitehall.

consequence of an obviously wrong course given by the pilot, the captain is responsible. Thus in the case of *The Vigilant*, which got ashore on the Gunfleet Sand on the 22nd of October, 1862, with a pilot on board, the captain and the master were severely censured by the Lords of the Admiralty (*m*).

Opinion of Elder Brethren of the Trinity House.

The opinion of the Elder Brethren of the Trinity House upon the respective duties of master and pilot is as follows:—"That in well-conducted ships the master does not regard the presence of a duly licensed pilot in compulsory pilot waters as freeing him from every obligation to attend to the safety of the vessel; but that, while the master sees that his officers and crew duly attend to the pilot's orders, he himself is bound to keep a vigilant eye on the navigation of the vessel, and, when exceptional circumstances exist, not only to urge upon the pilot to use every precaution, but to insist upon such being taken." And they add, that this is the view generally taken by shipowners (*n*).

Opinion of the Board of Trade.

The opinion of the Board of Trade as to the responsibility of the master is that "he is bound to exercise a vigilant supervision, and that though the advice of the pilot is of the greatest value, the master is not bound to follow it implicitly, if it appears in his deliberate judgment to involve danger to the ship." In accordance with this opinion, the Board of Trade holds that it rests with the master to decide whether in bad weather he will get under way for sea, and to say whether, under threatening circumstances, he will proceed or turn back (*o*).

The Merchant Shipping Acts.

The Legislature has not defined the duties of the pilot; but it assumes that it is the pilot's duty to conduct the

(*m*) See Report, &c., of the Unseaworthy Ships' Commission, 1874, vol. 2, p. 528.

(*n*) *Ibid.*

(*o*) See a letter from T. Gray, Esq., to the Mercantile Marine Association, 4th Oct. 1873, Unseaworthy Ships' Commission, 1874, vol. 2, p. 527. As to the view taken by the Admiralty Court on this point, see above, p. 244.

navigation of the ship. In the Merchant Shipping Act, 1854, he is spoken of as "having the conduct," "having command or charge," "having charge," "taking charge," and "acting in charge" of the ship (*p*).

In the Suez Canal.

In the Suez Canal there is a fixed and compulsory charge for pilotage, but the pilot does not supersede the master in the command and conduct of the ship. He is on board only as the adviser of the master; the responsibility as regards the navigation of the ship remains with the master. It is believed that the position of the pilot is the same in France and in Spain (*q*).

Necessity for pilot as regards insurance.

If a vessel sails from a port where there is an establishment of pilots, and the character of the navigation requires one, it has been held that the warranty of seaworthiness in a policy of insurance is not complied with if a pilot is not taken (*r*). And, according to an early case (*s*), if a pilot taken on board in pursuance of the statute leaves the ship before the voyage is completed, the policy is vitiated. *Law* v. *Hollingworth* has, however, been frequently doubted, and it is not clear upon what the judgment is founded. So far as it decides that underwriters are not liable for the master's negligence in not taking and retaining a pilot at a port other than that from which the ship sailed, it must be considered as overruled by later cases (*t*). There

(*p*) See ss. 2, 359, 362, 388; and *per* Brett, L. J. *The Guy Mannering*, 7 P. D. 132, 134. See also *The Clan Gordon*, 7 P. D. 190, where it was held that the words "any person having the care of" a ship did not refer to or properly describe a compulsory pilot.

(*q*) See the Suez Canal Regulations of 1st July, 1878, *infra*, p. 572; *The Guy Mannering*, 7 P. D. 52, 132. The Spanish Commercial Code, Arts. 676, 691, 693, places the pilot in the position of adviser to the captain, reserving the ultimate responsibility of the captain. The term *piloto* in Art. 693 seems to apply to the pilot (*piloto practico*) as well as to the mate or navigating officer. In America pilots of passenger ships have a special authority; 10 Stat. at Large, ch. 66, s. 28. It was held recently, in *The Augusta*, 6 Asp. M. C. 58, 161, that in France (Havre) the pilot advises and does not supersede the master.

(*r*) *Phillips* v. *Headlam*, 2 B. & Ad. 280.

(*s*) *Law* v. *Hollingsworth*, 7 T. R. 160.

(*t*) *Dixon* v. *Sadler*, 5 M. & W. at p. 415.

is, however, authority to the effect that, where at different stages of the voyage a different equipment is required, the warranty of seaworthiness in a policy is not complied with unless the ship is properly equipped at each stage (*u*). Possibly this principle might be applied to unseaworthiness due to the absence of a pilot.

And it is apprehended that, although there be no insurance, it is the duty of the master to take a pilot if he is unacquainted with the locality, and the nature of the navigation is such that a prudent seaman would not attempt to navigate without one.

Master's responsibility for collision with pilot on board.

As regards the master's responsibility for collision whilst his ship is properly in charge of a pilot, it is seldom that any question can arise. For a collision caused by the fault of the pilot the master is not answerable in damages (*v*).

In respect of damages.

The numerous cases upon compulsory pilotage which have defined the duties of the pilot on the one hand, and of the master and crew on the other, would seem to assign those duties to pilot, master, and crew, for all purposes, and not only for the purpose of determining the owner's liability for damages in case of collision. Thus, in a matter which, upon the question of the shipowner's liability for damages, is held to be within the pilot's province, it would seem that the master could not properly be held responsible in respect of his certificate at a Board of Trade enquiry. But this has not always been the view taken by courts of enquiry. With regard to the ship's speed, a court of enquiry has held it to be a matter for which the master is responsible (*x*); while the Admiralty Court, we have seen, holds the pilot answerable for speed. As to taking a ship to sea in bad weather, courts of enquiry, and the Board of Trade, throw

In respect of his certificate.

(*u*) *Quebec Marine Insurance Co.* v. *Commercial Bank of Canada*, L. R. 3 P. C. 240. See further *The Williams*, 6 C. Rob. 316; *The Portsmouth*, *ibid.* p. 317; Lowndes, Insurance, 2nd ed. 96.

(*v*) See 3 Kent's Comm. § 176; *The Octavia Stella*, 6 Asp. M. C. 182.

(*x*) In *The Ostrich* and *The Benbow*, Mitch. Mar. Reg. 1878, a master was held in fault for the ship's speed at a Board of Trade enquiry.

the responsibility on the master (*y*). The Admiralty decisions upon the point are not clear (*z*). The general rule, however, must be, that a master is not answerable in respect of his certificate for matters which are within the province of the pilot (*a*).

In respect of penalties for improper navigation.

The same rule applies with regard to penalties imposed by Act of Parliament for infringement of local bye-laws or regulations with reference to the navigation of ships. The master is not liable to such penalties where the act is that of the pilot, and done by the pilot in the performance of his duty (*b*).

In what Waters and for what Ships Pilotage is Compulsory.

In what waters and for what ships pilotage is compulsory.

Compulsory pilotage exists only in waters within the jurisdiction of a duly constituted pilotage authority, and for certain classes of ships upon particular voyages (*c*). Some of the principal pilotage authorities, such as the Trinity Houses of London, Hull, Newcastle, and Leith, were originally constituted by charter; but these, as well as various other authorities existing around the shores of the United Kingdom, are now regulated by Act of Parliament. The Acts relating to pilotage are general and local. The general law as to pilotage is contained in the Merchant Shipping Acts, 1854—1889 (*d*), and the Customs Consolidation Act, 1876 (*e*). The local Acts are stated below

(*y*) See Report of the Unseaworthy Ships' Commission, vol. 2, p. 527; *supra*, p. 255.

(*z*) See cases cited *supra*, p. 244.

(*a*) See *The Vesta*, before the Wreck Commissioner, Times, September 15th, 1879.

(*b*) See *Oakley* v. *Speedy*, 40 L. T. N. S. 881; *Michell* v. *Brown*, 28 L. J. Ad. 53.

(*c*) For foreign and colonial laws, see *infra*, p. 279.

(*d*) 17 & 18 Vict. c. 104, Part V.; 25 & 26 Vict. c. 63, ss. 40—42; 35 & 36 Vict. c. 73, ss. 9—11; 36 & 37 Vict. c. 85, ss. 19, 20; 52 & 53 Vict. c. 68. As to Cinque Port pilots, see 16 & 17 Vict. c. 129.

(*e*) 39 & 40 Vict. c. 36, s. 141.

(p. 264) in connection with the places to which they relate. The Merchant Shipping Acts authorize bye-laws to be made for the regulation of pilotage, which in some cases are required to be approved by Her Majesty in Council.

To ascertain whether, in a particular case, pilotage is compulsory or not, it is necessary to consider the combined effect of the general and local Acts, and of the bye-laws for the time being in force under them. The question is frequently one of considerable difficulty.

General Pilotage Acts.

By 17 & 18 Vict. c. 104, s. 353, compulsory pilotage was continued in all districts and for all ships (*f*) in and for which pilotage was compulsory on the 1st of May, 1855, the date of that Act coming into operation. The extent to which pilotage is compulsory under the general Act of 1854 can, therefore, be ascertained only by reference to the general and local Acts relating to pilotage in operation on the 1st of May, 1855. The general Act of that date was 6 Geo. IV. c. 125 (*g*).

By the same section of the M. S. Act, 1854 (s. 353), it was provided that all exemptions from compulsory pilotage in force on the 1st of May, 1855, should be continued. It has been held that this provision is general, and that its operation is not restricted by subsequent parts of the same Act which relate exclusively to the London Trinity House (*h*).

Ships carrying passengers between

The following section (sect. 354), however, restricts the operation of sect. 353. It imposes compulsory pilotage on

(*f*) In Part V. of this and the amending Act, "ship" includes foreign ships; see 52 & 53 Vict. c. 68, s. 1.

(*g*) There is some doubt as to how far the Act of Geo. 4 is general, and how far it relates only to the London Trinity House pilotage. The preamble and some of its provisions appear to confine its operation to London Trinity House pilotage; see *The Eden*, 2 W. Rob. 442; *Attorney-General* v. *Case*, 3 Price, 302; *The Maria*, 1 W. Rob. 95; but in *Tyne Improvement Commissioners* v. *General Steam Navigation Co.*, L. R. 2 Q. B. 65, it was held to apply to pilotage on the Tyne; and in *The Killarney*, Lush. 427, to Hull pilotage; and some of its sections are clearly of general application; see *Beilby* v. *Scott*, 7 M. & W. 93; *Carruthers* v. *Sidebotham*, 4 M. & S. 77; *The Hankow*, 4 P. D. 197.

(*h*) See *infra*, p. 273.

places in the United Kingdom.

all vessels carrying passengers between places situated in the United Kingdom, Jersey, Guernsey, Alderney, Sark, or Man. So far as sect. 354 is inconsistent with sect. 353, the former section prevails. Pilotage, therefore, is compulsory for vessels carrying passengers between the places mentioned above (*i*), although they were exempt under 6 Geo. IV. c. 125 (*k*); and it seems that, in the absence of express provision upon the point, this section (sect. 354) overrides all exemptions from compulsory pilotage, whether by Order in Council or statute.

Illustrations.

The following decisions illustrate the effect of the above sections. Notwithstanding the words of sect. 379, purporting to exempt certain classes of ships in the London Trinity House district, "when not carrying passengers," those ships, if exempt under the Act of George IV., are not required to take pilots though carrying passengers, unless they are plying between places in the United Kingdom or the islands mentioned above. Thus a vessel on a voyage from London to the Baltic, with passengers on board, is not required to take a pilot in the Thames (*l*). But a vessel navigating within the port to which she belongs (*m*), an Irish trader in the Thames (*n*), and a coaster (*o*) (some

(*i*) A vessel must have at least one passenger on board to come within the operation of s. 354; *The Hanna*, L. R. 1 A. & E. 283; *The Lion*, L. R. 2 A. & E. 102; on app. *ibid.* 2 P. C. 525. The marginal note to sect. 354 in the M. S. Act, 1854, which describes that section as relating to "home trade passenger ships," seems incorrect; see sect. 2 of the same Act.

(*k*) *The Temora*, Lush. 17. *The Queen of the Bay, Mumford* v. *Crocker*, Ship. Gazette, 14th June, 1878, seems inconsistent with *The Temora*.

(*l*) *Reg.* v. *Stanton*, 8 Ell. & B. 445; and see *The Earl of Auckland*, Lush. 164; on app. *ib.* 387; *The Mosells*, 32 L. T. N. S. 570.

(*m*) Exempt (*semble*) by 6 Geo. 4, c. 125, s. 29, and 17 & 18 Vict. c. 104, s. 353; *Dublin Port and Docks Board* v. *Shannon*, Ir. Rep. 7 C. L. 116; 21 W. R. Dig. 233. There is some doubt whether the Act of 6 Geo. 4, c. 125, applied to Ireland; see *The Eden*, 2 W. Rob. 442. The port to which a ship belongs is her port of registry for the time being: 17 & 18 Vict. c. 104, s. 33. It has been stated (Pilotage Committee Report, 1888) that it is the practice of some owners to register their ships trading to London at some other port in order that pilotage may be compulsory, so that they may not be liable in case of collision.

(*n*) *The Temora*, Lush. 17.

(*o*) *The Marmion*, *General Steam Navigation Co.* v. *London and Edin-*

if not all of which were exempt by the Act of Geo. IV.), must take a pilot if carrying passengers.

The Marmion, a steamship with passengers on board, on a voyage from Leith to London, was in collision, by her own fault, in the Thames above Gravesend, within the port of London. Her master had a pilotage certificate from Orfordness to Gravesend. At the time of the collision the ship was in charge of a Trinity pilot. The defence of compulsory pilotage being set up, it was contended that the ship was exempt as being a coaster within 6 Geo. IV. c. 125, s. 59. It was held that she was not exempt; and that, being in charge of a compulsory pilot, her owners were not liable (*p*).

The Hankow, a steamship with passengers on board, and belonging to the port of London, on her voyage from Australia to London, was in collision in the port of London, whilst in charge of a Trinity river pilot taken on board at Gravesend. It was held that pilotage was compulsory, and that her owners were not liable (*q*). The Charter of James II. to the London Trinity House being produced, it was held that the port of London was a place for which "particular provision" as to pilotage had been made, within the meaning of 6 Geo. IV. c. 125, s. 59; and, consequently, that there was no exemption from liability.

General exemptions from compulsory pilotage.

Pilotage is not compulsory for ships in distress, ships unable to obtain a qualified pilot, ships docking or changing moorings in port (*r*), or certain foreign ships under sixty

burgh Shipping Co., Mitch. Mer. Reg., 1st June, 1877; reported on another point, 2 Ex. D. 467.

(*p*) *The Marmion*, *ubi supra*.

(*q*) 4 P. D. 197. The learned judge considered that the case was governed by *The Killarney*, Lush. 427, and that *The Stettin*, Br. & Lush. 199, was not to be followed. The question as to the construction of the Act of Geo. 4 was decided in accordance with *The Stettin* in *The General Steam Navigation Co.* v. *The British and Colonial Steam Navigation Co.*, L. R. 3 Ex. 330; on app. *ibid.* 4 Ex. 238 (see *supra*, p. 234). It seems doubtful whether the decision in *The Hankow* is correct.

(*r*) 17 & 18 Vict. c. 104, s. 362; as to this exemption, see *The Victoria*, Ir. Rep. 1 Eq. 336; *The Maria*, L. R. 1 A. & E. 358; *Gregory* v. *Jones*, 90 L. T. 42, *inf.* p. 263, note (*x*); and as to a similar exemption under the Act of Geo. 4, see *Thornton* v. *Boland*, 2 Bing. 219; *McIntosh* v. *Slade*, 6 B. & C. 657; and as to the law under 5 Geo. 2, c. 20, see *Rex* v. *Lamb*, 5 T. R. 76; *Rex* v. *Neale*, 8 T. R. 241.

tons, exempted by Order in Council under 4 Geo. IV. c. 77, s. 5, or 6 Geo. IV. c. 125, s. 60. Orders in Council made under the latter Act of the following dates: 13th December, 1843, exempting certain vessels under sixty tons belonging to France, Sardinia, Portugal, Texas, Sweden, Norway, Russia, Denmark, Hanover, Prussia, Bremen, Lubeck, Hamburgh, Frankfort, the Netherlands, Greece, the United States, Mexico, Columbia, Venezuela, Brazil, Bolivia, Peru, Rio de la Plate, or Uruguay; and of 3rd September, 1843, exempting similar ships of Austria, Mecklenburg-Schwerin, Mecklenburg-Strelitz, or Oldenburg; and of 8th August, 1845, exempting similar ships of the Two Sicilies, appear to be still in force.

The Act 3 & 4 Vict. c. 68, empowered the Crown by Order in Council to exempt foreign ships in certain cases from compulsory pilotage. This power does not appear to have ever been exercised.

Ships passing through a pilotage district.

Another general exemption from compulsory pilotage is created by 25 & 26 Vict. c. 63, s. 41, which is as follows:—

"The masters and owners of ships passing through the limits of any pilotage district in the United Kingdom on their voyages between two places both situate out of such districts (*s*), shall be exempted from any obligation to employ a pilot within such district, or to pay pilotage rates when not employing a pilot within such district: provided that the exemption contained in this section shall not apply to ships loading or discharging at any place situate within such district, or any place situate above such district, on the same river, or its tributaries" (*t*).

The district intended in this enactment is a district other than that in which the final port of discharge or the port of loading is situate (*u*). It is not clear whether a vessel arriving from abroad and calling at a place in the United Kingdom for orders would be exempt under this

(*s*) *Sic.*

(*t*) An exemption similar to this is in force within the London Trinity House districts under a bye-law approved by Order in Council of 18th Feb. 1854, *infra*, p. 273.

(*u*) *Per* Brett, M. R., *The Winston*, 9 P. D. 85, where the history of this enactment is traced.

section. It would, probably, be held that she is not exempt. And (probably) the section does not apply so as to exempt ships, with passengers on board, plying between places in the United Kingdom or Channel Islands (*x*).

The Winston (*y*) was a decision upon this section. It was there held that a vessel putting into Dartmouth on a voyage from New York to Newcastle, and taking on board twenty tons of bunker coals to complete her voyage, was subject to compulsory pilotage, and therefore was not liable for a collision which occurred by the fault of the pilot in charge of her as she was leaving the harbour. The word "loading" did not, it was held, refer to cargo alone.

Masters' and mates' pilotage certificates.

British or foreign (*z*) ships, of which the master or mate has a pilotage certificate in accordance with the Merchant Shipping Acts, are exempt (*a*).

Differential pilotage rates.

By the Customs Consolidation Act, 1876 (*b*), it is provided that no foreign ship on a voyage from any place in the United Kingdom or the Channel Islands to any other such place shall be subject to any higher or other pilotage charge, or to any other rules as to the employment of pilots, than a British ship in the like case.

Policy of the law of compulsory pilotage.

The policy of the law, which seems formerly to have inclined towards compulsory pilotage for the supposed benefit of commerce and safety of seamen's lives (*c*), is

(*x*) See *supra*, p. 260. Sect. 41 of 25 & 26 Vict. c. 63, extends the exemption contained in 17 & 18 Vict. c. 104, s. 379, and is not subject to the qualifications of that enactment. A ship passing through the limits of a pilotage district, on a voyage between two places both situate out of such district, does not lose her exemption because she is bound (for a purpose other than loading or discharging) to an intermediate port within the district. A vessel under orders to proceed from London to Holyhead and there pick up a Liverpool pilot, and thence proceed to Liverpool, was not required to take a Holyhead pilot, though she picked up her Liverpool pilot within half-a-mile of the Holyhead breakwater, diverging five miles from her course and stopping her engines for the purpose: *Gregory* v. *Jones*, 90 L. T. 42.

(*y*) 8 P. D. 176; 9 P. D. 85. In this case, *Muller* v. *Baldwin*, L. R. 9 Q. B. 457, was referred to with reference to bunker coals.

(*z*) 52 & 53 Vict. c. 68, s. 1.

(*a*) 17 & 18 Vict. c. 104, ss. 340—344, 355. As to these certificates, see *The Killarney*, Lush. 202; *The Beta*, Br. & L. 328; *The Earl of Auckland*, Lush. 164; on app. *ib.* 387.

(*b*) 39 & 40 Vict. c. 36, s. 141.

(*c*) *Lucy* v. *Ingram*, 6 M. & W. 302; *The Fama*, 2 W. Rob. 184.

now in favour of restricting compulsory pilotage within as narrow limits as possible (*d*). The Acts of 1854 and 1862 enable pilotage authorities to make bye-laws to regulate pilotage and to exempt ships. It has been held that, under these powers, pilotage can, in no case, be made compulsory for ships which were exempt at the time of the passing of the Act of 1854 (*e*).

Summary of Local Pilotage Acts.

Places at which compulsory pilotage exists.

The places at which, and the Acts, bye-laws, and Orders in Council, under which compulsory pilotage exists at various ports in the United Kingdom, are as follows (*f*):—

Aberavon: See *Port Talbot.*

Aberbrothwick or *Arbroath:* See *infra*, p. 277.

Aberdeen: Pilotage is compulsory for inward-bound vessels: 31 & 32 Vict. c. 138 (Local), ss. 135 *seq.*; for bye-laws, see Parl. Paper, No. 154, Sess. 1889; Ord. in Council of 25th June, 1872.

Aberdovey: See *London Trinity House.*

Arundel: Pilotage is compulsory for all vessels of 30 tons and upwards; 33 Geo. III. c. 100 (Local); for bye-laws, see Parl. Paper, No. 154, Sess. 1889.

Ayr: Pilotage is compulsory for vessels inward and outward bound; 18 & 19 Vict. c. 119 (Local), s. 51, except vessels under 40 tons, see Parl. Paper, No. 408 of 1867; for bye-laws, see Parl. Paper, No. 154, Sess. 1889.

Ballina: Pilotage is compulsory for inward-bound vessels; 23 & 24 Vict. c. 165 (Local), ss. 42, 43.

Beaumaris: See *London Trinity House.*

Belfast: Pilotage is compulsory for vessels inwards and

(*d*) See *per* Sir R. Phillimore, *The Halley*, L. R. 2 A. & E. 3, 16.

(*e*) *The Earl of Auckland*, Lush. 164, 387; *Reg.* v. *Stanton*, 8 E. & B. 445; 25 & 26 Vict. c. 63, ss. 39, 40.

(*f*) A return of the rules and bye-laws for the time being in force is made yearly to the Board of Trade by every pilotage authority, and the returns are laid before Parliament: see 17 & 18 Vict. c. 104, ss. 337, 339. The last returns to which the writer has access is Parl. Paper, No. 154, Sess. 1889. The limits of the several pilotage districts, and the bye-laws, will be found set out in these returns.

outwards, except ships in ballast and ships coming in from stress of weather and whilst within the limits of the out-pilot ground; 10 & 11 Vict. c. 52 (Local), ss. 98—106; for bye-laws, see Parl. Paper, No. 154, Sess. 1889 (*g*); Ord. in Council of 15th Aug. 1890.

Blakeney or *Clay:* Pilotage is compulsory for all vessels, except coasters of 50 tons and upwards, entering or leaving the harbour; 57 Geo. III. c. 70 (Local); for bye-laws, see Parl. Paper, No. 154 of 1889.

Boston: Pilotage is compulsory inwards and outwards for vessels over 30 tons o. m.; 16 Geo. III. c. 23; for bye-laws, see Parl. Paper, No. 154, Sess. 1890, and Ord. in Council of 28th Nov. 1889; see, also, 32 Geo. III. c. 79.

Bridgwater: See *London Trinity House.*

Bristol: Pilotage is compulsory for all vessels navigating the Bristol Channel eastwards of Lundy Island (4° 40′ W. long.) (*h*), except coasters, Irish traders, and vessels bound to or from Cardiff, Newport, or Gloucester; 47 Geo. III. (Sess. 2) c. 33 (Local), ss. 9—27; 24 & 25 Vict. c. 236 (Local), s. 4; but see 11 & 12 Vict. c. 43 (Local); for bye-laws, see Parl. Paper, No. 154, Sess. 1889; Order in Council of 19th July, 1862. As to Breandown Harbour, see 25 & 26 Vict. c. 29 (Local). See, also, *Neath, Bridgwater, Swansea, Penarth, Cardiff, Newport, Gloucester.*

Caernarvon, Carlisle: See *London Trinity House.*

Chester: Pilotage is compulsory for all vessels, except coasters and Irish traders; 16 Geo. III. c. 61 (Local) (*i*); for bye-laws, see Parl. Paper, No. 154, Sess. 1889.

Clyde: See *Glasgow.*

Colchester: See *London Trinity House.*

Dartmouth: See *London Trinity House.*

Drogheda: Pilotage is compulsory inwards and outwards for all vessels except steamships; 5 Vict. (Sess. 2) c. 56 (Local), ss. 200—205; and vessels under 30 tons; for Rules, &c., see Parl. Paper, No. 154, Sess. 1889.

Dublin: Pilotage is compulsory for all vessels inwards and

(*g*) *The De Brus*, Ir. Rep. (Ad.) 1 Eq. 72; *The Arbutus*, 2 Mar. Law Cas. O. S. 136.

(*h*) *Hall* v. *Cardiff Pilotage Board*, C. P. D. 18th Nov. 1879; see Parl. Paper, No. 154, Sess. 1889.

(*i*) *Jones* v. *Bennett*, 63 L. T. N. S. 705.

outwards of the port of Dublin or the harbour of Kingstown, except coasters under 50 tons, vessels in ballast and coasters laden with fish in bulk or potatoes; 32 & 33 Vict. c. 100 (Local), ss. 20 *seq.*; for bye-laws, see Parl. Paper, No. 154, Sess. 1889. See also *The Meteor* (*j*), and *Dublin Port and Docks Board* v. *Shannon* (*k*), decisions under the above Act.

Dundalk: Pilotage is compulsory for all vessels, in and out, except vessels under 30 tons, and vessels coming in from stress of weather; 18 & 19 Vict. c. 189 (Local), ss. 91 *seq.*; for Regulations, see Parl. Paper, No. 154, Sess. 1889.

Elgin: See *Lossiemouth.*

Exeter, Falmouth, Fleetwood, and *Fowey:* See *London Trinity House.*

Fraserburgh: Pilotage is compulsory for all vessels of 30 tons or upwards, in or out, except harbour tugs; 41 Vict. c. 51 (Local), ss. 116, 117; for Regulations, &c., see Parl. Paper, No. 154, Sess. 1889.

Gainsborough: See *Kingston-upon-Hull.*

Galway: Pilotage is compulsory inwards and outwards from the roadstead to the docks for all vessels of and over 50 tons, and vessels coming in from stress of weather or contrary winds; 16 & 17 Vict. c. 207 (Local), ss. 62 *seq.*; and see 23 & 24 Vict. c. 202 (Local).

Glasgow: Pilotage is regulated in the Clyde by 21 & 22 Vict. c. 149 (Local), ss. 134 *seq.* It is compulsory for vessels over 60 tons navigating the Clyde between Hutchinsontown Bridge and a straight line drawn from the east end of Newark Castle to Cardross Burn, except vessels under 100 tons in tow of a tug whose master has a pilotage certificate; see Order in Council of 12th September, 1863. The bye-laws are in Parl. Paper, No. 154, Sess. 1889 (*l*).

Goole: See *Kingston-upon-Hull.*

Greenock: 29 & 30 Vict. c. 156 (Local); and see *Glasgow.*

Grimsby: See *Kingston-upon-Hull,* and 12 & 13 Vict. c. 81 (Local).

Hartlepool: Pilotage appears to be no longer compulsory

(*j*) Ir. Rep. 9 Eq. 567.
(*k*) Ir. Rep. 7 C. L. 116.
(*l*) See also *The Eden,* 2 W. Rob. 442; *Clyde Navigation Company* v. *Barclay,* 1 App. Cas. 790.

for any ships. See *Newcastle-upon-Tyne;* see also 28 & 29 Vict. c. 58; Orders in Council of 27th June, 1876, and 7th February, 1888; for bye-laws, see Parl. Paper, No. 154, Sess. 1889.

Harwich and *Holyhead:* See *London Trinity House.* The Harwich district includes the river Stour to Mistley.

Hull and *Humber:* See *Kingston-upon-Hull.*

Ipswich (*m*): 15 Vict. c. 116 (Local): See *London Trinity House.* The Ipswich district includes the river Orwell down to Harwich.

Irvine: See *infra,* p. 277.

Isle of Wight: See *London Trinity House.*

King's Lynn: Pilotage is compulsory in and out for all vessels, except vessels under 30 tons; 13 Geo. III. c. 30 (Local); 4 & 5 Vict. c. 47 (Local); and except vessels arriving within the Marsh Cut banks without falling in with a pilot; for bye-laws, see Parl. Paper, No. 154, Sess. 1889; and Orders in Council of 1st March, 1864; 14th April, 1869; 21st February, 1874; 26th March, 1878; 18th March, 1880; 25th July, 1882; 25th January, 1887.

Kingston-upon-Hull, Trinity House of: The Trinity House of Hull was incorporated by charters of 23rd Elizabeth and 13th Charles II. (*n*). Its jurisdiction (*o*) includes the river Humber, Hull, Goole, Selby, Grimsby, Gainsborough, Spalding, and Wisbeach. It is now regulated by 2 & 3 Will. IV. c. 105 (Local); and 12 & 13 Vict. c. 81 (Local); see also 17 & 18 Vict. c. 104, s. 387; 6 Geo. IV. c. 125, s. 89. Under the Act of Will. IV., pilotage, outwards and inwards, is compulsory for all vessels except British coasters, British vessels drawing less than 6 feet of water, vessels putting in for shelter or provisions, and vessels under 150 tons drawing 10 feet or less than 10 feet of water, and navigating between Goole and Hull Roads; see bye-law approved by Order in Council of 20th November, 1873; for bye-laws, see Parl. Paper, No. 154,

(*m*) *Hadgraft* v. *Hewith*, L. R. 10 Q. B. 350.

(*n*) See *The Killarney*, Lush. 427, 436.

(*o*) For the limits of the jurisdiction, see *The Killarney, ubi supra; Beilby* v. *Raper*, 3 B. & Ad. 284; *Dock Company of Hull* v. *Browne*, 2 B. & Ad. 43.

Sess. 1889; and Orders in Council of 31st July, 1858, 11th January, 1859, 12th September, 1863, 10th May, 1872, 25th June, 1857, 20th November, 1873, 26th October, 1876, 29th January, 1889, and 21st October, 1890.

It has been held that under the Local Act (ss. 22, 89) pilotage is not compulsory for a vessel being towed from one part of the port of Hull to another (*p*). But it is compulsory for an inward-bound vessel whilst passing through one dock to her berth in another dock; and not the less so because she has brought up in the river before reaching her berth; and though one pilot brings her in from the sea, and another berths her (*q*).

In *The Killarney* (*r*) it was held that pilotage is compulsory for a Goole vessel inward bound to Goole. The compulsion is by virtue of 17 & 18 Vict. c. 104, s. 353, which continues 6 Geo. IV. c. 125, by which (s. 58) pilotage is compulsory in licensed waters, except (s. 59) (amongst other exceptions) where a ship is in her home port, being a port for which no "particular provision" as to pilotage had there been made by Act or charter. The exception of sect. 59 does not include Hull, for which provision was made by 52 Geo. III. c. 39.

Pilotage certificates are granted to the masters and mates of foreign ships by the Trinity House of Hull.

By the original charters the Hull Trinity House was enabled to grant licences to pilot vessels outward bound only. It was doubted by Dr. Lushington, in *The Killarney*, whether the charters empowered the Hull Trinity House to make pilotage compulsory under penalty; but by 52 Geo. III. c. 39, s. 21, provision was made for granting licences for piloting vessels bound inwards.

Kirkcaldy: Pilotage is compulsory for vessels inward bound under 12 & 13 Vict. c. 30 (Local), s. 31; 39 & 40 Vict. c. 179 (Local); for bye-laws, see Parl. Paper, No. 154, Sess. 1889.

(*p*) *The Maria*, L. R. 1 A. & E. 358.

(*q*) *The Rigborgs Minde*, 8 P. D. 132.

(*r*) Lush. 427; followed in *The Maria*, *ubi supra*; *The Rigborgs Minde*, 8 P. D. 132. It seems, however, doubtful whether 6 Geo. 4, c. 125, ss. 58, 59, apply to Hull pilotage; see *supra*, p. 259, note (*g*). As to 52 Geo. 3, c. 39, s. 34, applying to Hull pilotage, see *Usher* v. *Lyon*, 2 Price, 118.

Lancaster: Pilotage is compulsory in and out, 47 Geo. III. (Sess. 2) c. 37 (Local); for bye-laws, see Parl. Paper, No. 154 (Sess. 1889).

Limerick: See *infra*, p. 277.

Littlehampton: See *Arundel*.

Liverpool: Pilotage is compulsory inwards and outwards, except for coasting vessels in ballast, coasting vessels under 100 tons, and, perhaps, coasting steamships outward bound(*s*); 21 & 22 Vict. c. 92 (Local); for bye-laws, see Parl. Paper, No. 154 (Sess. 1889), and Orders in Council of 9th May, 1866, 30th January, 1854, and 26th January, 1881 (*t*). The effect of the Act appears to be that vessels under 100 tons, not being coasters, are not exempt; see sects. 130—141.

Llanelly: Pilotage is compulsory for all vessels with cargo, and for all vessels above forty tons register in ballast, bound over the Bar of Burry inwards; and for all vessels of thirty tons register with cargo, or of fifty tons register in ballast outward bound. See *The Ruby* (*u*); see also 53 Geo. III. c. 183 (Local); 6 & 7 Vict. c. 88 (Local); 21 & 22 Vict. c. 72 (Local); 27 & 28 Vict. c. 203 (Local); and for bye-laws, see Parl. Paper, No. 154, Sess. 1889.

London: The principal pilotage authority in the United Kingdom is the Trinity House of Deptford Strond (*x*). Its jurisdiction includes three districts, or classes of districts (*y*). They are, (1) The London District, extending from Orfordness, on the north, to Dungenness, on the south, and comprising the Thames and Medway up to London and Rochester Bridges; (2) The English Channel District, extending from Dungenness to the Isle of Wight (*z*); (3) The Trinity Outport

(*s*) This exemption is not expressly repealed by the local Act, and seems to be still in force under 17 & 18 Vict. c. 104, s. 353.

(*t*) For decisions under the Liverpool Act, see *The Princeton*, 3 P. D. 90; *The City of Cambridge*, L. R. 4 A. & E. 161; on app. *ib.* 5 P. C. 451; *The Ocean Wave*, L. R. 3 P. C. 205; *The Annapolis* and *The Johanna Stoll*, Lush. 295; *The Cachapool*, 7 P. D. 217; and under the former Liverpool Act, *Carruthers* v. *Sidebotham*, 4 M. & S. 77; *Attorney-General* v. *Case*, 3 Price, 302; *Rodriguez* v. *Melhuish*, 10 Ex. 110; *The Northampton*, 1 Sp. E. & A. 152; *The Agricola*, 2 W. Rob. 10.

(*u*) 15 P. D. 139, 164.

(*x*) Hereinafter called the London Trinity House.

(*y*) See 17 & 18 Vict. c. 104, s. 370.

(*z*) As to this district, see also Isle of Wight, Newhaven, Shoreham.

Districts, comprising any pilotage district for the appointment of pilots within which no particular provision is made by any Act of Parliament or charter (*a*).

At Bridgwater, Ipswich (*b*), and Neath, the London Trinity House is the pilotage authority, and compulsory pilotage is established by special Acts (*c*). Between Orfordness and the Nore the jurisdiction of the London Trinity House is exclusive. The Leith Trinity House, notwithstanding the terms of its charter, and of 1 Geo. IV. c. 37, has no authority to grant pilotage licences for that district (*d*).

The bye-laws of the London Trinity House are set out in Parl. Paper, No. 154, Sess. 1889.

The names of the Trinity Outport Districts are: Aberdovey, Beaumaris, Bridgwater (*e*), Bridport, Caernarvon, Carlisle, Colchester, Dartmouth (*f*), Exeter (*g*), Falmouth (*h*), Fleetwood and Barrow, Fowey, Harwich, Holyhead, Ipswich (*i*), Isle of Wight, Lowestoft, Maldon, Milford, Neath (*k*), Newhaven, Padstow, Penzance, Plymouth, Poole, Portmadoc, Rochester, Rye, St. Ives (Hayle), Scilly, Shoreham, Southampton, Teignmouth, Wells, Weymouth (*l*), Woodbridge and Yarmouth (*m*). Their limits are defined in Parl. Paper, No. 154, Sess. 1889 (*n*). It will be found that the districts extend, in many cases, far beyond the limits of the ports from which they are named. For example, the Falmouth and Fowey districts together include the whole of the coast and seas from Looe to the Lizard; and the Yarmouth district includes all harbours and roadsteads from Yarmouth to Orfordness, thence across the Kentish Knock (*i.e.*, on a line running

(*a*) See *Hadgraft* v. *Hewith*, L. R. 10 Q. B. 350.

(*b*) *Hadgraft* v. *Hewith*, *supra*.

(*c*) These Acts are specified in connection with the places to which they relate.

(*d*) *Hossack* v. *Gray*, 12 L. T. N. S. 701.

(*e*) See Ord. in Council of 17th May, 1867; 8 & 9 Vict. c. 89 (Local).

(*f*) See Ord. in Council of 12th Aug. 1859.

(*g*) See Ord. in Council of 4th Nov. 1857.

(*h*) See *The Juno*, 1 P. D. 135.

(*i*) 15 Vict. c. 116 (Local), under which coasters under 50 tons are exempt; and see *Hadgraft* v. *Hewith*, L. R. 10 Q. B. 350.

(*k*) 6 & 7 Vict. c. 71 (Local).

(*l*) See Ord. in Council of 6th June, 1859.

(*m*) See *The Earl of Auckland*, Lush. 387.

(*n*) See also Maude & Pollock on Shipping, 4th ed. App. pp. 110—125.

outside or to the eastward of the Knock) to the Downs. Some of the districts are non-exclusive and overlap; the English Channel district, for example, appears to include the Newhaven and Shoreham districts.

The production of evidence that the Trinity House was accustomed to license pilots for the district at and previous to the passing of 17 & 18 Vict. c. 104, is sufficient proof that the district is an outport district within sect. 370 of the same Act (*o*).

Orders in Council approving bye-laws of the London Trinity House, by which various classes of ships are exempted from compulsory pilotage, and providing for the granting of pilotage certificates to masters and mates, are of the following dates: 13th December, 1843; 3rd September, 1844; 8th August, 1845; 18th February, 1854 (*p*); two of 1st May, 1855; 21st November, 1855; two of the 16th July, 1857 (*q*); 25th July, 1861; 21st December, 1871 (*r*); two of 5th February, 1873; 20th November, 1873; two of 6th September, 1880; and 17th May, 1882. An attempt is made below to summarize the effect of these exemptions.

In the London District and Outport Districts pilotage is expressly made compulsory by 17 & 18 Vict. c. 104, s. 376. In the English Channel District (except such parts of it as are within the Newhaven, Shoreham, and Isle of Wight districts) pilotage is free. There are, however, large classes of ships for which pilotage is free in the compulsory districts. Besides the ships free under the general exemptions created by the Merchant Shipping Act, 1854, mentioned above, the following are exempt in the London district (*s*):—British ships on their

(*o*) *The Juno*, 1 P. D. 135. At Falmouth the limits of the district have been extended so as to include the anchorage outside. It has been doubted whether compulsory pilotage can be so extended: see n. (*e*), *supra*, p. 264.

(*p*) Made under 16 & 17 Vict. c. 129, s. 21.

(*q*) These Orders in Council will be found set out in Maude & Pollock on Shipping, 4th ed. App. pp. 60 *seq.*

(*r*) In the case of a line of steamers running from London to Japan, back to London, thence to European ports north of Boulogne, and so back to London, it was held that pilotage is free for the voyage with a crew of runners from London to Holland: *Courtney* v. *Cole*, 19 Q. B. D. 447.

(*s*) All these exemptions must be taken to be subject to 17 & 18 Vict. c. 104, s. 354, which imposes compulsory pilotage on ships carrying

inward or outward voyage from or to the Cattegat or White Sea, or any place in or between them, whether using the north or south channels of the Thames; British ships being constant traders to or from ports between Boulogne (inclusive) and the Baltic; British ships passing on their voyage through any pilotage district, and not anchoring therein; ships sailing from Dover, Deal, or the Isle of Thanet, up or down the Thames or Medway or into or out of any place within the jurisdiction of the Cinque Ports, and owned wholly or in part by master or mate residing in Dover, Deal, or the Isle of Thanet. All these are exempt under 17 & 18 Vict. c. 104, s. 353 (which continues 6 Geo. IV. c. 125, ss. 59, 62), and an Order in Council of the 18th of February, 1854 (*t*).

The following ships, whether British or foreign, are exempt in the London and Outport Districts: (A) coasters, ships of and under 60 tons, stone ships from the Channel Islands, ships navigating within their home ports (*u*); (B) ships in ballast, on a voyage between places in the United Kingdom (*x*); (C) ships trading between Great Britain, the Channel Islands or the Isle of Man, and any place in Europe north of Boulogne, or between Brest (inclusive) and Boulogne (*y*); (D) ships passing through the limits of any pilot-

passengers between places in the United Kingdom, or adjacent islands; see *The Temora*, Lush. 17.

(*t*) See *Reg.* v. *Stanton*, 8 E. & B. 445; *The Earl of Auckland*, Lush. 164, 387; *The Moselle*, 2 Asp. M. L. C. 586; *The Wesley*, Lush. 268; *The Hanna*, L. R. 1 A. & E. 283. The last case, followed in *The Vesta*, 7 P. D. 240, establishes the distinction, indicated in the text, between British and foreign ships. As to the existence of this distinction, notwithstanding 24 & 25 Vict. c. 47, see *infra*. See *per* Sir R. Phillimore, *The Vesta*, *ubi supra*, as to the clumsy language of the Order in Council of 18th February, 1854. As to the last class of ships mentioned in the text, see *Williams* v. *Newton*, 14 M. & W. 747; *Peake* v. *Scrutch*, 7 Q. B. 603. The Act 16 & 17 Vict. c. 129, does not appear to have repealed 6 Geo. 4, c. 125, s. 62.

(*u*) As to (A), see 17 & 18 Vict. c. 104, s. 379. As to coasters, see *The Lloyds* or *The Sea Queen*, Br. & Lush. 359; *The Agricola*, 2 W. Rob. 10; as to ships within their home-port, where the port is London, and as to the limits of the port of London, *The Stettin*, Br. & Lush. 199, and *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.*, L. R. 3 Ex. 330; *ibid.* 4 Ex. 238, are in conflict with *The Hankow*, 4 P. D. 197. It is submitted that the decisions in the earlier of these cases are correct. See also *The Killarney*, Lush. 427.

(*x*) As to the class (B), see Orders in Council of 21st Nov. 1855, and 25th July, 1861.

(*y*) As to (C), *The Wesley*, Lush.

age district, not being bound to any place in such district or anchoring therein (*z*). Notwithstanding the words of 17 & 18 Vict. c. 104, s. 379, purporting to exempt some of these ships "when not carrying passengers," these words do not restrict the extent of the exemption (*a*), and the ship is exempt although she has passengers on board.

The exemptions created by the general Acts (*supra*, p. 259) apply in the London Trinity House districts as elsewhere; similarly, vessels in the London Trinity House districts are subject to the general obligation to take a pilot when carrying passengers between places in the United Kingdom (*supra*, p. 259).

The London Trinity House grants licences to masters and mates of certain passenger ships, both British and foreign, to pilot different ships belonging to the same owner (*b*). A vessel of which the master or mate has such a certificate is, therefore, exempt from compulsory pilotage.

Licences for over-sea pilotage (*i.e.*, beyond the limits of its jurisdiction) are granted by the London (*c*), and also by the Hull, Trinity Houses. Pilotage with such licences is voluntary (*d*).

The power given to the London Trinity House by 6 Geo. IV. c. 125, s. 51, to make regulations as to the pilotage of foreign vessels bringing provisions, does not appear to have been exercised.

Londonderry: Pilotage is compulsory on all vessels, inwards

268; *The Lion*, L. R. 2 P. C. 525; *The Hanna*, L. R. 1 A. & E. 283; 17 & 18 Vict. c. 104, s. 379; Order in Council of 21st Dec. 1871. See *Courtney* v. *Cole*, 19 Q. B. D. 447, *supra*, p. 271. The words in sect. 379 are "trading to." They do not confine the exemption to ships bound to or from one of the London Trinity House pilotage districts. Thus, a steamship bound from Liverpool to Hamburg was in collision off Dungeness. She took a pilot when going up the London river for repairs, and got into collision again in the Thames. It was held that she came within the exemption of sect. 379, that pilotage was not compulsory for her, and that her owners were liable: *The Sutherland*, 12 P. D. 154.

(*z*) As to (D), see Order in Council of 18th Feb. 1854, and 17 & 18 Vict. c. 104, s. 379.

(*a*) *Reg.* v. *Stanton*, *ubi supra*; *The Earl of Auckland*, *ubi supra*.

(*b*) Order in Council of 16th July, 1857.

(*c*) See Order in Council of 20th Nov. 1873.

(*d*) But *quære*, if such a pilot were to supersede an unlicensed pilot under 51 & 52 Vict. c. 68, s. 5.

and outwards, except vessels of and under 60 tons in ballast; 48 Geo. III. c. 136 (Local), s. 23; 17 & 18 Vict. c. 177 (Local), ss. 68 *seq.*; for bye-laws, see Parl. Paper, No. 154, Sess. 1889.

Lossiemouth: Pilotage is compulsory inwards and outwards for all vessels over 40 tons; 19 & 20 Vict. c. 67 (Local), s. 57; 31 & 32 Vict. c. 47 (Local); for regulations, see Parl. Paper, No. 154, Sess. 1889.

Lowestoft, *Maldon*, *Milford*, *Neath*, *Newhaven*, *Padstock*, and *Penzance*. See *London Trinity House*.

Macduff: See *infra*, p. 277.

Middlesborough: See *infra*, *Newcastle*.

New Ross: See *infra*, p. 277.

Newcastle-upon-Tyne, *Tyne*, and *Tees:* The jurisdiction of the Trinity House of Newcastle-upon-Tyne (*e*) includes Blyth, Seaham, North Sunderland, Holy Island, Whitby, Warkworth Amble, and Alnmouth. It formerly included the river Tyne and the river Tees, and the ports of Hartlepool and Sunderland; but now by 28 & 29 Vict. c. 44 (the Tyne Pilotage Order Confirmation Act), amended by 30 & 31 Vict. c. 78, pilotage jurisdiction over the whole of the river Tyne, and seawards over a radius of seven miles (including the ports of Tynemouth, Newcastle, and Shields), has been transferred to the Tyne Pilotage Commissioners. Within that jurisdiction pilotage is not compulsory (*f*). By similar Acts (27 & 28 Vict. c. 58; 28 & 29 Vict. c. 59, and 45 Vict. c. 1 (Local)), pilotage jurisdiction over the ports of Hartlepool and Sunderland, and over the whole of the Tees, including the ports of Stockton and Middlesborough, was transferred from the Trinity House of Newcastle-upon-Tyne to the Hartlepool Pilotage Commissioners, the Sunderland Pilotage Commissioners, and the Tees Pilotage Commissioners, and pilotage is not, it would seem, compulsory within those jurisdictions (*g*). Under 41 Geo. III. c. 86 (Local), pilotage is compulsory on

(*e*) 17 & 18 Vict. s. 378.

(*f*) See sect. 16 of the Schedule to the Act, and *The Johann Sverdrup*, 11 P. D. 49; 12 P. D. 43.

(*g*) Sect. 16 of the schedule to the Hartlepool Act, sect. 14 of the schedule to the Sunderland Act, and sect. 15 of the schedule to the Tees Act, are nearly identical in terms with sect. 16 of the schedule to the Tyne Act, adjudicated upon in *The Johann Sverdrup*, *ubi supra*.

foreign ships (*h*) within the jurisdiction of the Trinity House of Newcastle-upon-Tyne, except, it seems, foreign coasters, as to which see 39 & 40 Vict. c. 36, s. 141. The existing bye-laws have been made by the following Orders in Council: For Newcastle-upon-Tyne, 14th February, 1883; for the Tyne, 17th June, 1887; for Hartlepool, 27th June, 1876, and 7th February, 1888; for Sunderland, 29th June, 1882, and 8th March, 1886; and for the Tees, 16th December, 1882. See Parl. Paper, No. 154, Sess. 1889.

Newry: See *infra*, p. 277.

Peterhead: Pilotage is compulsory under 36 & 37 Vict. c. 157 (Local), ss. 77 *seq.*, for all vessels of 30 tons and upwards bound in and out, except steam-tugs for the use of vessels frequenting the harbour. See Order in Council of 1st April, 1881; 39 & 40 Vict. c. 174 (Local); and for bye-laws, Parl. Paper, No. 154, Sess. 1889.

Plymouth and *Poole:* See *London Trinity House.*

Port Talbot (formerly *Aberavon*): Pilotage is compulsory under 4 Will. IV. c. 43 (Local), s. 73, on all vessels inwards and outwards (*i*).

Portmadoc, Rye, Scilly, and *Shoreham.* See *London Trinity House.*

Pulteney: Pilotage is compulsory for vessels over 40 tons in and out; 20 & 21 Vict. c. 93 (Local), ss. 52, 54. See also *Wick.*

St. Ives (*Hayle*). See *London Trinity House.*

Sligo: Pilotage is compulsory for inward-bound ships of 20 tons and upwards, except vessels reaching Oyster Island without being boarded; 40 Vict. c. 35 (Local); for regulations, see Parl. Paper, No. 154, Sess. 1889.

Spalding. See *Kingston-upon-Hull.*

Southampton. See *London Trinity House.*

Southwold: Pilotage is compulsory, inwards and outwards, for vessels of 40 tons and upwards; 11 Geo. IV. c. 48 (Local); for bye-laws, see Parl. Paper, No. 204 of 1874.

(*h*) *The Maria*, 1 W. Rob. 95; *Tyne Improvement Commissioners* v. *General Steam Navigation Co.*, L. R. 2 Q. B. 65. 24 & 25 Vict. c. 47, does not relieve foreign ships from the obligation to take a pilot. See *The Vesta*, 7 P. D. 240.

(*i*) From the Board of Trade returns it does not appear that any pilots are licensed under this Act.

Sunderland, North. See *Newcastle-upon-Tyne*; 28 & 29 Vict. c. 59; Orders in Council, 29th June, 1882, and 8th March, 1886.

Swansea: Pilotage is compulsory for vessels inward bound, except vessels under 100 tons in ballast; 17 & 18 Vict. c. 126 (Local); Orders in Council of 22nd February, 1860; 4th February, 1861; 7th January, 1864; and 22nd May, 1883; for bye-laws, see Parl. Paper, No. 154, Sess. 1889. The effect of the general and local Acts and of the bye-laws is by no means clear.

Tees (River): See *Newcastle-upon-Tyne.*

Teignmouth, Thames: See *London Trinity House.*

Tralee: See *infra*, p. 277.

Tyne: See *Newcastle-upon-Tyne.*

Waterford: Pilotage is compulsory in and out; 9 & 10 Vict. c. 292 (Local); 37 & 38 Vict. c. 116, ss. 12 *seq.*; except for vessels drawing less than 6 feet; for bye-laws, see Parl. Paper, No. 154, Sess. 1889; Order in Council, January 12th, 1891 (*k*).

Wells: See *London Trinity House.*

Westport: Pilotage is compulsory for all vessels, in or out, except within the limits of the out pilot grounds, or when the master is licensed; 16 & 17 Vict. c. 185 (Local), ss. 13 *seq.*; see Parl. Paper, No. 154, Sess. 1889.

Wexford: Pilotage is compulsory for all vessels, in or out, with cargo or passengers; 37 & 38 Vict. c. 40 (Local), ss. 73 *seq.*; see also 25 & 26 Vict. c. 122 (Local), and bye-laws approved by Order in Council, 26th October, 1875; Parl. Paper, No. 154, Sess. 1889.

Weymouth; See *London Trinity House.*

Wick: Pilotage is compulsory for vessels over 20 tons, entering and leaving the harbour, except frequent traders whose masters or mates have pilotage certificates (*l*); 25 & 26 Vict. c. 180 (Local), ss. 10, 22, 23, 24; see also 20 & 21 Vict. c. 93; for bye-laws, see Parl. Paper, No. 154, Sess. 1889.

Wicklow: Pilotage is compulsory in and out, except for

(*k*) As to Waterford, see *The Victoria*, Ir. Rep. A. 1 Eq. 336.

(*l*) This seems to be the effect of the local Acts; but their language is not clear.

steamships in certain cases; 5 & 6 Vict. c. 111 (Local), ss. 134 *seq.*; and see 14 & 15 Vict. c. 121 (Local).

Wisbeach: See *Kingston-upon-Hull;* and see 50 Geo. III. c. 206 (Local).

Woodbridge, Yarmouth (*m*). See *London Trinity House.*

Places at which bye-laws are in existence purporting to make pilotage compulsory.

At *Aberbrothwick*, or *Abroath, Irvine, Limerick, Macduff, New Ross, Newry*, and *Tralee*, it is not clear whether compulsory pilotage exists or not. In some cases bye-laws purporting to make it compulsory have been made. The Acts by which the pilotage authorities at these places are regulated are as follows:—

Aberbrothwick, or *Abroath:* 2 & 3 Vict. c. 16 (Local); 27 & 28 Vict. c. 33 (Local); for bye-laws, see Parl. Paper, No. 154, Sess. 1889. *Irvine:* 36 & 37 Vict. c. 124 (Local); for bye-laws, see Parl. Paper, No. 154, Sess. 1889. *Limerick:* 4 Geo. IV. c. 94 (Local); 10 & 11 Vict. c. 198 (Local); bye-laws, Parl. Paper, No. 154, Sess. 1889. *Macduff:* 10 & 11 Vict. c. 127 (Local). *New Ross:* 24 & 25 Vict. c. 140 (Local); 37 & 38 Vict. c. 116 (Local). *Newry:* 10 Geo. IV. c. 126 (Local); Order in Council of 16th May, 1878. See Parl. Paper, No. 154, Sess. 1889. *Tralee:* 9 Geo. IV. c. 118 (Local). See Parl. Paper, No. 154, Sess. 1889.

Pilotage authorities exist at the following places, but at all of them pilotage is free. Information concerning those marked with an asterisk, and bye-laws, where they exist, will be found in Parl. Paper, No. 154, Sess. 1889 (Pilotage Return):—

Berwick:* 48 Geo. III. c. 104 (Local); 25 Vict. c. 31 (Local). *Borrowstownness*:* 38 & 39 Vict. c. 137 (Local); 46 & 47 Vict. c. 76 (Local); Order in Council, 26th June, 1886. *Buckie* (*Cluny*): 37 & 38 Vict. c. 185 (Local). *Burghead*:* 21 & 22 Vict. c. 39 (Local); Order in Council, 17th May, 1888. *Burntisland*:* 44 & 45 Vict. c. 85 (Local). *Cardiff** (*n*), including *Penarth:* 24 & 25 Vict. c. 236 (Local), repealing 19 & 20 Vict. c. 122 (Local): quære, whether, under sect. 31 of this Act, pilotage is compulsory for a ship "bound

(*m*) As to the limits of the Yarmouth district, see *supra*, p. 270.

(*n*) See Orders in Council of October 21st, 1890, as to the Ports of Cardiff and Barry.

foreign" from Penarth with passengers; 43 & 44 Vict. c. 24 (Local); Orders in Council of 20th October, 1874, and 20th April, 1883. *Carlingford Bar**: 27 & 28 Vict. c. 93; Order in Council of 16th May, 1878. *Charlestown*: 22 & 23 Vict. c. 96 (Local); Order in Council, 8th February, 1890. *Coleraine**: 42 & 43 Vict. c. 175 (Local); 48 & 49 Vict. c. 185 (Local); Order in Council, 25th January, 1887. *Cork** (*o*): 1 Geo. IV. c. 52 (Local). *Dingle**: 48 & 49 Vict. c. 104 (Local); Order in Council, 26th June, 1886. *Douglas* (Isle of Man): 35 & 36 Vict. c. 23. *Dundee**: 38 & 39 Vict. c. 150 (Local). *Eyemouth*: 37 & 38 Vict. c. 185 (Local). *Gardenstown*: 39 & 40 Vict. c. 40 (Local). *Gloucester**: 24 & 25 Vict. c. 236 (Local). *Grangemouth*: 49 & 50 Vict. c. 76 (Local); Order in Council, February 19th, 1889. *Hastings*: 25 & 26 Vict. c. 51. *Inverness**: 46 & 47 Vict. c. 43 (Local); Order in Council, 5th July, 1889 (superseding, it seems, the regulations set out in the latest Pilotage Returns). *Leith Harbour and Docks**: 28 Geo. III. c. 58 (Local); 38 & 39 Vict. c. 160 (Local); Order in Council of 30th June, 1860. *Leith Trinity House** (*p*): 1 Geo. IV. c. 37; 5 Geo. IV. c. 39 (Local). *Leven and Methil**: 39 & 40 Vict. c. 173 (Local); 46 & 47 Vict. c. 43 (Local); 52 & 53 Vict. c. 90 (Local), ss. 34, 38; Order in Council, 8th February, 1890; superseding, it seems, that of 25th January, 1887. *Nairn** (No bye-laws). *Newcastle-upon-Tyne**: See above, p. 274. *Newport (Mon.)**: 24 & 25 Vict. c. 236 (Local). *Penarth*: 19 & 20 Vict. c. 122 (Local); see above, *Cardiff*. *Porthcawl**: 18 Vict. c. 50 (Local); Parl. Paper, No. 154, Sess. 1889; Orders in Council, 6th May, 1857, and 27th November, 1878. *Rosehearty**: 26 & 27 Vict. c. 104. *Sandhaven**: 36 & 37 Vict. c. 63 (Local); Order in Council, 20th March, 1877. *Stonehaven**: 6 Geo. IV. c. 54 (Local); 45 & 46 Vict. c. 168 (Local). As to Hartlepool, Sunderland, and Tees river, see above, pp. 266, 274, 276.

(*o*) See *The Eden*, 2 W. Rob. 442.

(*p*) The Leith Trinity House was incorporated by charter of 27th July, 1797. As to the limit of its jurisdiction, see *Hossack* v. *Gray*, 6 Br. & S. 598.

Pilotage in Foreign and Colonial Waters.

Compulsory pilotage exists in many foreign countries, including the United States of America, France, Germany, Belgium, Holland, Spain, Portugal, Russia, and the Argentine Republic. But, except in Germany (see Allgemeines Deutsche Handelsgesetzbnch, Art. 740), the doctrine that the shipowner is not liable for the fault of a compulsory pilot does not prevail abroad: see, as to America, *The China*, 7 Wall. 53, and observations 2 Stuart's Vice Ad. Rep. (Canada) 231; *The Merrimac*, 14 Wall. 199; *Smith* v. *The Creole*, 2 Wall. (jun.) 485; 2 Parsons on Ship. (ed. 1869) 117; *Smith* v. *Condry*, 1 How. 28: as to France, Caumont, Abordage Maritime, §§ 191—194; Codes Annotées, Sirey et Gilbert, Code Commerc. Art. 216, § 9; Sibille, Abordage, 280: as to Spain, Codigo de Commercio, Arts. 676, 691, 693: as to Belgium, see *The Halley*, L. R. 2 P. C. 193: and generally as to foreign law on the subject, see Reports of Pilotage Committees of 1870 and 1888.

The following is a summary of pilotage laws in force in some of the British colonies and dependencies:—

Australia, South: Pilotage compulsory; 44 & 45 Vict. No. 237, s. 282.

Australia, Western: Pilotage compulsory; 18 Vict. No. 15, s. 7.

Bermuda: Pilotage compulsory; Law No. 2 of 1843 continued by subsequent laws.

Bombay: See *Muhammad Yusuf* v. *Peninsular & Oriental Steam Navigation Co.*, 6 Bombay L. R. 98.

Canada: 36 Vict. c. 54, makes the payment of pilotage charges compulsory; but expressly provides that no ship need be placed in charge of a pilot (ss. 56, 69); and that nothing in the Act shall be deemed to exempt owners from liability for the fault of a compulsory pilot (s. 69): See *The Quebec*, 19 Low. Canada Jur. 197. 31 Vict. c. 58, and 27 & 28 Vict. c. 13, s. 14, are (*semble*) repealed by the later Canadian law.

Jamaica: Pilotage compulsory; Law 35 of 1873; Law 29 of 1879; Law 19 of 1881; Law 36 of 1889.

Mauritius: Ordinance No. 26 of 1881.

New South Wales: 35 Vict. No. 7.

New Zealand: Pilotage compulsory; 31 Vict. No. 32; 33 Vict. No. 42.

Newfoundland: St. John's; pilotage compulsory for inward-bound ships, except coasters; Ch. 100, Consolidated Statutes of Newfoundland.

Nova Scotia: Pilotage compulsory; Revised Statutes, Third Series, Ch. 79; 33 Vict. c. 17.

Prince Edward's Island: Pilotage compulsory (with exceptions); 7 Will. 4, c. 19.

Queensland: Pilotage compulsory; 46 Vict. No. 12, s. 113.

South Australia: See *Australia, South.*

Straits Settlements: Pilotage compulsory; Ordinance No. 8 of 1869; Pilotage Ordinance, 1868.

Tasmania: Pilotage compulsory; 21 Vict. No. 16, ss. 73, 74.

Victoria: Pilotage compulsory; 28 Vict. No. 255, ss. 73, 74.

Western Australia: See *Australia, Western.*

CHAPTER XI.

COLLISION WITH REFERENCE TO—(1) THE SHIPOWNER'S LIABILITY AS CARRIER—(2) THE CONTRACT OF INSURANCE.—CRIMINAL AND OTHER CONSEQUENCES OF COLLISION.

THE liability of the shipowner for loss by collision of goods on board his ship may be considered under two heads: (1) his liability at common law by the custom of the realm; (2) his liability upon the contract of carriage. A common hoyman (*a*), the owner of barges, flats, or lighters, who lets them out for hire (*b*), the owner of a general ship trading between places within the realm or to foreign lands (*c*), are subject to the liability of a common carrier. Whether the owner of a ship that is not a general ship, and trades to foreign lands, is a common carrier, or liable as such, is doubtful (*d*). Again, whether the owner of a general ship is liable as a common carrier, except so far as he is protected by the contract, where he carries goods under a bill of lading, was, until of late years, a question much disputed (*e*). It appears to be now decided that he is not (*f*).

Whether shipowner is a common carrier.

(*a*) *Forward* v. *Pittard*, 1 T. R. 27.

(*b*) *Dale* v. *Hall*, 1 Wils. 281; *Lyon* v. *Mells*, 5 East, 428; *Liver Alkali Co.* v. *Johnson*, L. R. 9 Ex. 338.

(*c*) *Morse* v. *Slue*, 1 Ventr. 190, 238; see on this case *per* Blackburn, J., L. R. 9 Ex. 341; *per* Cockburn, C. J., 1 C. P. D. 430; *Barclay* v. *Cuculla y Gana*, 3 Dougl. 389.

(*d*) See *Liver Alkali Co.* v. *Johnson*, *ubi supra*; *Nugent* v. *Smith*, 1 C. P. D. 19; *ib.* 423; *Chartered Mercantile Bank of India, London, and China* v. *Netherlands India Steam Navigation Co.*, 10 Q. B. D. 521.

(*e*) See 1 Parsons on Shipping, pp. 245 *seq.* ed. 1869, where the writer states that he is not so liable.

(*f*) *Nugent* v. *Smith*, 1 C. P. D. 19, 423; but see *per* Pollock, B., *Chartered Mercantile Bank of India, London, and China* v. *Netherlands India Steam Navigation Co.*, 9 Q. B. D. 118; *Hayn* v. *Culliford*, 4 C. P. D. 182.

Shipowner's liability at common law.

At common law, where the shipowner is subject to the liability of a common carrier, he is liable as insurer against loss or damage from any cause except the act of God and the Queen's enemies (*g*). For injury to passengers on board his ship he is liable only where it is caused by the negligence of himself or his agents, the officers or crew (*h*). To passengers, therefore, he is liable for injury in a collision caused by the fault of his own ship, or by the fault of both ships. To cargo-owners he is liable at common law for loss or damage in a collision by the fault of his own, or of both ships, or where it is an inevitable accident. It is possible that a collision might occur by act of God, in which case he would not be liable. But the ordinary so-called case of collision by inevitable accident, as where it is caused by stress of weather, fog, or latent defect in gear, would not be held to be an act of God (*i*).

It has been held in America that owners of a tug towing craft with goods on board are not liable as common carriers for the safety of the goods (*k*).

Shipowner's liability on the contract of carriage.

In practice the shipowner carrying goods usually contracts himself out of the onerous liability imposed on him by the common law. By the charter-party or bill of lading it is usually agreed that the goods shall be carried and delivered in good order, unless loss or damage shall arise from certain specified causes. These causes, technically called "exceptions," commonly include "perils, dangers, and accidents of the sea, rivers, land, carriage, and steam navigation, of whatsoever nature and kind." Under a bill of lading so framed the shipowner is not liable for a collision which occurs without negligence in either ship (*l*),

(*g*) *Nugent* v. *Smith*, 1 C. P. D. 19; *ib.* 423.

(*h*) See *Redhead* v. *Midland Rail. Co.*, L. R. 2 Q. B. 412; on app. *ib.* 4 Q. B. 379, and the cases there cited.

(*i*) See *Nugent* v. *Smith*, 1 C. P. D. 19, 34, as to what is an act of God.

(*k*) *Caton* v. *Rumney*, 13 Wend. 387. This seems to be the general rule, but there are contrary decisions; see 1 Parsons on Shipping (ed. 1869), 247, note.

(*l*) *Buller* v. *Fisher*, 3 Esp. 67; *Chartered Mercantile Bank of India*,

or for a collision caused wholly by the fault of the other ship (*m*); but he is liable where there is negligence in his own ship. Sometimes in the bill of lading there is contained an exception of "collision." In that case the shipowner is not liable for a collision caused by the fault of the other ship (*n*); but he remains liable for a collision caused by the fault of his own ship. The reason for his liability for a collision, caused wholly or in part by the fault of his own ship, is that "underlying the contract implied or involved in it (the bill of lading) is . . . an engagement on his part to use due care and skill in navigating the ship and carrying the goods" (*o*).

Exception of "collision" in bill of lading.

To cover loss by the fault of the carrying ship the following exception is sometimes added:—"Accidents, loss, or damage, from any act, neglect, or default whatsoever, of the pilot, master, or mariners, or other servants of the shipowner in navigating the ship." These words cover loss in a collision caused by the fault of the carrying ship (*p*); but they do not cover loss by a collision with another ship of the same owners caused entirely by the fault of such ship (*q*).

Other exceptions.

An exception of "dangers or accidents of navigation" in a bill of lading covers loss of cargo by collision caused by the fault of the other ship (*r*).

London, and China v. *Netherlands India Steam Navigation Co., Limited*, 10 Q. B. D. 521. As to American law on the point, see Angell on Carriers, 5th ed. 513.

(*m*) *Wilson, Sons & Co.* v. *Owners of Cargo per Xantho, The Xantho*, 12 App. Cas. 503, overruling *Woodley* v. *Michell*, 11 Q. B. D. 47.

(*n*) *Lloyd* v. *General Iron Screw Collier Co.*, 3 H. & C. 284; *Grill* v. *General Iron Screw Collier Co.*, L. R. 1 C. P. 600; on app. *ib.* 3 C. P. 476; *Woodley* v. *Michell*, 11 Q. B. D. 47; *Chartered Mercantile Bank, &c.* v. *India Steam Navigation Co.*, 10 Q. B. D. 521, 531.

(*o*) *Per* Lord Macnaghten, *The Xantho*, 12 App. Cas. 503, 515.

(*p*) *Chartered Mercantile Bank, &c.* v. *Netherlands India Steam Navigation Co.*, 10 Q. B. D. 521. Except, perhaps, where there is negligence on the part of the owner in appointing an incompetent master or crew; see *per* Brett, M. R., 10 Q. B. D. 532.

(*q*) *Chartered Mercantile Bank, &c.* v. *Netherlands India Steam Navigation Co., ubi supra.*

(*r*) *Sailing Ship Garston Co.* v. *Hickie, Borman & Co.*, 18 Q. B. D. 17.

The Bernina was in collision partly by her own fault. Goods on board were in consequence of the collision transhipped to another ship, and whilst being carried on to their destination were lost by the fault of those on board the carrying ship. It was held that an exception in the original bill of lading of "act of God, Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation," did not cover the loss (*s*).

Collision between ships of the same owner.

In the case of a collision between the carrying ship and another belonging to the same owners, the effect of the exception last mentioned, together with the statutory rule as to division of loss where both ships are in fault (36 & 37 Vict. c. 66, s. 25, sub-sect. 9), is to relieve the shipowner from making good to the cargo-owner more than half his loss. He is liable as carrier for half, and for half only, of the loss on the goods (*t*).

The case (*u*) which decided these points was as follows:—A collision occurred between *The Crown Prince* and *The Atjeh*, a ship belonging to the owners of *The Crown Prince*, by the fault of both ships. The question arose whether the shipowners were liable to the owners of cargo shipped on board *The Crown Prince* under a bill of lading containing exceptions of, amongst other things, "collision," and "accidents, loss, or damage from any act, neglect, or default whatsoever of the pilots, master, or mariners, or other servants of the company in navigating the ship." It was held that the shipowners were not liable upon the contract of carriage. Baggallay and Lindley, L.JJ., were of opinion that the exception of "collision," although it did not cover the negligence of *The Crown Prince* (*x*), did cover that of *The Atjeh;* and further, that the negligence of *The Crown Prince* was

(*s*) *The Bernina* (No. 2), 12 P. D. 36.

(*t*) *Chartered Mercantile Bank, &c. v. Netherlands, &c. Co.*, 10 Q. B. D. 521.

(*u*) *Ibid.*

(*x*) *Lloyd* v. *General Iron Screw Collier Co.*, 3 H. & C. 284; *Grill* v. *General Iron Screw Collier Co.*, L. R. 1 C. P. 600; *ib.* 3 C. P. 476.

covered by the other exception stated above. In the Court below (*y*), Pollock, B., and Manisty and Stephen, JJ., considered that the shipowners were not protected by the exception of "collision," on the ground that, since liability for loss by collision caused by the fault of the carrying ship is not excluded by that exception, neither is loss by collision caused by the fault of the carrying ship and another belonging to the same owners. Pollock, B., and Stephen, J., held that, though the second exception would have protected the shipowners, if the collision had been caused entirely by the fault of *The Crown Prince*, it had no application to a case where both ships were in fault. Manisty, J., held that the contract in the bill of lading was express, to carry and deliver the goods safely, subject to certain exceptions, which did not include negligence of those on board *The Atjeh*. Pollock, B., appears to have held the shipowners were liable as common carriers, being unprotected by the terms of their bill of lading.

As stated above, the Court of Appeal reversed the decision of the Court below as to the liability of the shipowners on the bill of lading. But the shipowners were held liable in tort (*z*) for the negligence of their servants on board *The Atjeh*, though, by reason of the rule as to division of loss, for only half the loss.

Rule as to division of loss.

The rule as to division of loss where both ships are in fault does not affect the right of a cargo-owner to recover full damages for breach of the contract of carriage against the owner of the carrying ship, though the other ship was also in fault for the collision. But it abridges his common law right, as against the owner of the other ship, by limiting the liability of the wrong-doer to one-half the loss (*a*);

(*y*) 9 Q. B. D. 118.

(*z*) As to the liability of the shipowner in tort as well as upon the contract, see *Morgan* v. *Ravaz*, 6 H. & N. 265; *Pontifex* v. *Midland Rail. Co.*, 3 Q. B. D. 23.

(*a*) *The Milan*, Lush. 388; *Chapman* v. *Royal Netherlands Steam Navigation Co.*, 4 P. D. 157, 165; *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, 10 Q. B. D. 521. *The*

and this is the case even where the two ships belong to the same owner (*b*). If part of the loss on cargo is recovered against the owner of the carrying ship, the residue, up to one-half the loss, may be recovered against the other ship (*c*).

Exception of "barratry" does not cover negligence of carrying ship.

Damage to goods in a collision caused by the negligence of those on board is not covered by an exception of barratry in the bill of lading (*d*).

Shipowners contracted with a passenger that they should not be responsible for any loss or damage arising from perils of the sea . . . . or from any act, neglect, or default whatsoever of the pilot, master, or mariners. It was held that no damages could be recovered for the death of the passenger, who was killed in a collision for which the carrying ship was in fault (*e*).

Whether exception of "perils of the sea" covers infringement of the Regulations.

Where the collision is caused by an unnecessary, but not negligent, breach of the Regulations for preventing collisions at sea, so as to cause the ship to be deemed to be in fault under 36 & 37 Viet. c. 85, s. 17, it seems to have been considered by Brett, M. R., in *Woodley* v. *Michell* (*f*), that the shipowner would be liable for damage to cargo, notwithstanding an exception in the bill of lading of "perils of the sea." *Sed qu.*

Milan, ubi supra, so far as it decides that the innocent cargo-owner can recover no more than half his loss against the other ship, has not been followed in America. It has been held by the Supreme Court that the innocent cargo-owner is entitled to a decree for the whole of his loss against either of the wrong-doing ships if one only is sued; if both are sued he is entitled to a decree for half his loss against each; and if a moiety of his loss exceeds in amount the statutory liability of either of them, or if, for any other reason, he fails to obtain half his total loss from either of them, he is entitled to a further decree against the other for the difference; see *The Alabama* and *The Gamecock*, 2 Otto, 695; *The Janiata*, 3 Otto, 337; *The Atlas*, *ib.* 302; *The Virginia Ehrman*, 7 Otto, 309; *The City of Hartford* and *The Unit*, *ib.* 323; *The City of Paris*, 14 Blatchf. 531; *The Civilta* and *The Restless*, 13 Otto, 699; *The Eleonora*, 17 Blatchf. 88.

(*b*) *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, *ubi supra*.

(*c*) *The Demetrius*, L. R. 3 A. & E. 523.

(*d*) *Grill* v. *General Iron Screw Collier Co.*, L. R. 3 C. P. 476.

(*e*) *Haig* v. *Royal Mail Steam Packet Co.*, 52 L. J. Q. B. 395, 640.

(*f*) 11 Q. B. D. 117.

Effect of notice that carrier will not be liable for negligence of servants.

A railway company carrying passengers by land and sea attempted to free themselves from liability for the negligence of their servants by repudiating such liability in public notices and advertisements. Where, after publication of such a notice, a collision occurred between a ship employed by the railway company, with cargo and passengers on board, and another ship, by the fault of the former, it was held that, under the Acts regulating their steamship traffic (*g*), the company were liable to the passengers and cargo-owners, notwithstanding the notice (*h*).

Shipowners' liability to charterer for loss by collision.

Whether the shipowners are liable to the charterer for loss sustained by the latter in consequence of a collision for which the chartered ship is in fault, will depend upon the terms of the charter-party. Where such liability exists, it will extend to expenses of salving the cargo which have been paid by the charterers or their underwriters (*i*).

In a case (*k*) where the officers and crew were the servants of the owner, though by the terms of the charter-party the ship was "placed under the direction of" the charterer, it was held that the owners were liable to the charterer for loss sustained by the latter in consequence of the ship getting ashore by the negligence of her crew.

Liability of master as carrier.

The master, as well as the owner, is liable for the loss of goods taken on board by him as a common carrier (*l*). And it is said that he is liable for the negligence and misfeasance of his officers and crew (*m*). In America, it was

(*g*) The Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31); 26 & 27 Vict. c. 92, s. 31; 34 & 35 Vict. c. 119, s. 12.

(*h*) *Doolan* v. *Midland Rail. Co.*, 2 App. Cas. 792.

(*i*) *Scaramanga* v. *Marquand*, 5 Asp. M. C. 410, 506.

(*k*) *Omoa and Cleland Coal and Iron Co.* v. *Huntley*, 2 C. P. D. 464. Amongst other cases, *Fletcher* v. *Braddick*, 2 B. & P. (N. R.) 182, seems to have been relied on by the Court as establishing that the owners would be liable to third parties for the negligence of the crew. Cf. *The Tasmania*, 13 P. D. 110.

(*l*) *Morse* v. *Slew* (or *Slue*), 3 Keb. 72, 112, 135 (best report); Raym. 220; 1 Mod. 85; 1 Ventris, 238; *Boucher* v. *Lawson*, Cas. t. Hardw. 85, 194.

(*m*) Story on Agency, §§ 314—317; 3 Kent's Comm. 218; Molloy, l. 2, c. 2, s. 13.

held that the master was liable to a passenger on board his ship who was injured by a collision caused by the fault of the pilot, and not by the fault of the master (*n*).

Jurisdiction in Admiralty in case of damage to cargo.

There is jurisdiction in Admiralty in respect of a claim by the owner, consignee, or assignee of the bill of lading of goods carried into any port in England or Wales (*o*), for damage to the goods by the negligence or breach of contract by the owner, master, or crew of the carrying ship, provided no owner or part owner of the ship is at the time of the institution of the action resident in England or Wales (*p*). To enable him to sue, it seems to be necessary that the property in the goods should have passed to him (*q*). Though the statute gives a right to proceed against the ship in Admiralty, there is no maritime lien for damage in such a case (*r*).

The right of the shipowner to recover against the cargo-owner general average contribution for the expenses of raising his ship sunk in collision, is considered elsewhere (*s*).

The application of the Act limiting the liability of shipowners upon the contract of carriage to an amount depending upon the tonnage of their ship, is considered above in connection with the subject of limitation of liability (*t*). It may be here noticed that railway companies carrying by sea in ships not owned by themselves are entitled to the benefit of this Act in some cases in which other carriers by sea are not (*u*).

(*n*) *Denison* v. *Seymour*, 9 Wend. 9.

(*o*) As to the meaning of this term, see *The Bahia*, Br. & L. 61; *The Pieve Superiore*, L. R. 5 P. C. 482; *The Dantzic*, Br. & L. 102.

(*p*) 24 Vict. c. 10, s. 6; 36 & 37 Vict. c. 66, s. 16.

(*q*) See *The Freedom*, L. R. 3 A & E. 495, following *The St. Cloud* Br. & L. 4; *The Norway*, Br. & L 377. The contrary has been held by Sir R. Phillimore, though the facts did not render a decision upon the point necessary. See *The Figlia Maggiore*, L. R. 2 A. & E. 106; *The Nepoter*, *ibid.* 375. It does not appear that these cases were cited in *The Freedom*.

(*r*) *The Pieve Superiore*, L. R. 5 P. C. 482.

(*s*) *Infra*, p. 302.

(*t*) *Supra*, pp. 161 *seq.*

(*u*) See *supra*, p. 178.

Collision with reference to the Contract of Insurance.

Loss by a collision which occurs without fault in either ship is a loss by peril of the sea within the meaning of that term in an ordinary policy of insurance on ship (*x*). And loss by collision caused by the negligence of the other ship is a peril of the sea for which underwriters are liable (*y*). Where the collision is caused by the fault of both ships, or of the insured ship alone, it seems that the underwriters are liable for the loss on the insured ship (*z*). The principle is that, where the loss is caused by a peril insured against, the insurers are liable, although the loss was also caused by the negligence of the insured or his servants (*a*). In such cases the loss is said to be caused proximately by the peril specified, and remotely by the negligence, and the maxim *causa proxima non remota spectatur* applies (*b*).

Insurer's liability where collision is without fault in either ship.

Where it is by the fault of the other ship.

Where it is by the fault of both ships, or of insured ship alone.

Expenses arising from delay caused by collision are not recoverable under the ordinary Lloyd's policy (*c*).

Demurrage expenses arising from collision.

(*x*) In *Buller* v. *Fisher*, 3 Esp. 67, it was held to be within the exception of "perils of the sea" in a charter-party; *Phillips* v. *Baillie*, 3 Dougl. 374.

(*y*) *Smith* v. *Scott*, 4 Taunt. 126; and see *per* Lord Cairns, C., *Simpson* v. *Thompson*, 3 App. Cas. 279, 286. See also *Blythe* v. *Marsh*, 1 M'Cord, 360, cited in Angell on Carriers, 5th ed. 153, note, as to the law in America.

(*z*) *De Vaux* v. *Salvador*, 4 Ad. & E. 420; *Simpson* v. *Thompson*, 3 App. Cas. 279; *The Potomac*, 15 Otto, 630; *General Mutual Insurance Co.* v. *Sherwood*, 14 How. 351 (the last two are American cases).

(*a*) *Dixon* v. *Sadler*, 5 M. & W. 414, 415; S. C. on app., 8 M. & W. 895; *Walker* v. *Maitland*, 5 B. & A. 171; *Busk* v. *Royal Exchange Assurance Co.*, 2 B. & Ald. 73; *Dudgeon* v. *Pembroke*, 2 App. Cas. 284; *Davidson* v. *Burnand*, L. R. 4 C. P. 117, 121.

(*b*) See further as to this subject, Park on Insurance, 8th ed. 139; Arnould on Insurance, 5th ed. 744—746; Phillips on Insurance, §§ 1417—1420; *Simpson* v. *Thompson*, 3 App. Cas. 279. Cf. French Commercial Code, Arts. 350 and 353; Spanish C. C. Art. 861; Dutch C. C. Art. 637; German C. C. Arts. 824 and 825. By the two first codes, only *abordages fortuits*, by the others, all collisions, are at the insurer's risk. It has been held that loss in a collision caused by the fault of those on board the carrying ship does not arise from barratry, within the meaning of that term in a bill of lading: *Grill* v. *General Iron Screw Collier Co.*, L. R. 3 C. P. 476.

(*c*) *De Vaux* v. *Salvador*, 4 A. & E. 420.

The "running-down" clause.

By the old form of marine policy the insurers did not undertake to repay to the assured damages which may be recovered against them for a collision in which their ship was in fault (*d*). But it is now usual for the insurers upon a Lloyd's policy, by a special clause, known as the "running-down" clause, to agree to pay three-fourths of any such damages; and the remaining one-fourth is frequently covered by separate insurance.

A common form (*e*) of the running-down clause in a Lloyd's policy is as follows:—

"And it is further agreed that if the [ship], hereby insured, shall come into collision with any other ship or vessel, and the assureds shall in consequence thereof become liable to pay, and shall pay, any sum or sums not exceeding the value of the said vessel hereby assured, we, the assurers, will severally pay the assureds such proportions of three-fourths of the sum so paid, as our respective subscriptions hereto bear to the insured value of the said vessel. And in cases where the liability of the ship has been contested, with our consent in writing, we will also pay a like proportion of three-fourths of the costs thereby incurred or paid. But this agreement is in no case to be construed as extending to any sums the assureds may become liable to pay, or shall pay, in respect to loss of life or personal injury to individuals from any cause whatever."

A running-down clause expressed to cover damages which the assured ship should be compelled to pay for running down and damaging another ship was held not to include damages recovered against the insured ship by the representatives of persons on board the other ship who

(*d*) *De Vaux* v. *Salvador*, 4 A. & E. 420. This case, once dissented from in America, is now recognized as binding by the Supreme Court: *General Mutual Insurance Co.* v. *Sherwood*, 14 How. 352. *Aliter* by French law: Caumont, Dict. de Droit Mar. tit. Abordage; and by German law: German C. C. Art. 824.

(*e*) This form is taken from Maude & Pollock on Shipping, 4th ed. 446.

lost their lives in the collision (*f*). In another case (*g*) a similar clause was held not to include costs which the insured incurred in defending a collision action brought against his ship. In the form of policy in use at Lloyd's, these points are now expressly provided for; the insurers undertake to repay three-fourths of the costs, if the liability of the ship is contested with their consent; and damages for loss of life or personal injury are expressly left at the risk of the assured.

A ship was insured in a policy containing a running-down clause, by which the insurers undertook to bear three-fourths of any sum, not exceeding the value of the ship and freight, which the assured should become liable to pay, and should pay, for collision with another ship. The ship insured was sold in an Admiralty damage suit for less than her value. It was held that the underwriters were liable for no more than three-fourths of the sum for which the ship was sold (*h*).

The Balnacraig (*i*) was insured with the London Steamship Owners' Insurance Association against "loss of or damage to any other vessel . . . so far as such loss is not covered by the usual form of Lloyd's policies with the clause commonly known as the running-down clause attached." She was also insured with the same association and at Lloyd's against the usual maritime risks, including collision. Whilst so insured she came into collision with *The Karo*, and in the collision both ships received damage, but the loss to *The Balnacraig* exceeded that to *The Karo*. Both ships were in fault, and the owners of *The Karo* (without any action being brought by or against them) paid to the owners of *The Balnacraig* the difference between

(*f*) *Taylor* v. *Dewar*, 5 B. & S. 58; but the contrary has been held in Scotland, *Coey* v. *Smith*, 22 Court of Session Cases, 955; *Excelsior Co.* v. *Smith*, 2 L. T. N. S. 90.

(*g*) *Xenos* v. *Fox*, L. R. 4 C. P. 665.

(*h*) *Thompson* v. *Reynolds*, 7 E. & B. 172.

(*i*) *London Steamship Owners' Insurance Co.* v. *Grampian Steamship Co.*, 24 Q. B. D. 32; affirmed on app., 62 L. T. N. S. 784.

half the losses on the two ships respectively. The question arose (in a claim for a set-off in an action for money received by the defendants, *The Balnacraig* owners, for the use of the plaintiffs, the Insurance Association), whether *The Balnacraig* owners were entitled to recover against the Association a sum of 51*l.*, which sum represented one-fourth of the damage suffered by *The Karo* in the collision, and had been taken into account in reduction of the amount paid by her owners to the owners of *The Balnacraig*. It was held by Mathew and Wills, JJ., that *The Balnacraig* owners were entitled to receive nothing from the Association; that the collision clause in the Lloyd's policy never came into operation, because nothing was ever paid or payable by *The Balnacraig* owners to *The Karo* owners. The principle laid down by *The Khedive* (*k*) (said Mathew, J.) was, that "neither in fact nor in law is the owner of the assured ship liable to pay or entitled to receive more than the balance which equalises the loss;" and the words of the collision clause, "become liable to pay and shall pay," showed that it was intended to operate only where the balance of loss by collision being against the assured ship, she had to make a payment to the other ship.

Insurance against servants' negligence.

It is a maxim of insurance law that the assured cannot seek indemnity for a loss produced by his own wrong-doing (*l*). But this rule does not invalidate a contract to indemnify the assured against damages payable by him in respect of loss caused by the negligence of his servants (*m*). Any doubt that formerly existed as to the validity of such insurances (*n*) is removed by 25 & 26 Vict. c. 63, ss. 54, 55. They may be effected without a policy (*o*), and have given rise to a new and special class of insurance societies or clubs (*p*).

(*k*) 7 App. Cas. 795.

(*l*) See *per* Lord Campbell, *Thompson* v. *Hopper*, 6 E. & B. 172, 191.

(*m*) See *Thompson* v. *Reynolds*, 7 E. & B. 172; *Walker* v. *Maitland*, 5 B. & A. 171.

(*n*) See *Anonymous Case*, 5 Taunt. 605.

(*o*) 30 & 31 Vict. c. 23, s. 7.

(*p*) See Arnould on Insurance, 5th ed. 724.

Loss after voyage insured from collision occurring during voyage.

If a ship receives her death wound in a collision which occurs during a voyage or time for which the ship is insured, and she sinks after the completion of the voyage or time, a question might arise as to the liability of the insurers. In a case mentioned by Willes, J. (*q*), but not reported, the insurer (*r*) was held not liable in such case. In *Knight* v. *Faith* (*s*), a somewhat similar case, the case above referred to was doubted, and underwriters on a time policy were held liable for a partial loss.

Insurers subrogated to rights of insured.

After paying the amount due upon the policy for a total loss the insurers are entitled to the ship herself, salvage from her (*t*), and all the rights of the assured in respect of her (*u*). But they are not necessarily subject to liabilities to which the owner was subject in respect of her (*x*). So they are entitled to any damages that may be recovered against the wrong-doer in a collision by which the insured ship is injured or lost (*y*). And, in the case of a valued policy, the right of the insurers is the same, although the value named in the policy is less than the actual value of the ship (*z*).

A policy of insurance was effected for 6,000*l.* upon a ship which was valued at 6,000*l.* The ship was sunk in a

(*q*) *Meretony* v. *Dunlope*, 1 T. R. 260. It appears that insured in report of 1817 is a misprint for insurer: see 15 Q. B. 664, note.

(*r*) See *Lockyer* v. *Offley*, 1 T. R. 252. If a ship which is insured is injured in collision and is repaired, and afterwards becomes a total loss, the insurers are liable as well for the expense of the repairs as for the loss. But they are not liable for damage caused by the collision beyond the expense actually incurred in repairing such damage: *Stewart* v. *Steele*, 5 Scott, N. R. 927.

(*s*) 15 Q. B. 649, 667. See also *Lidgett* v. *Secretan*, L. R. 5 C. P. 190.

(*t*) As to what is salvage, see *Burnand* v. *Rodocanachi*, 6 Q. B. D. 633; 7 App. Cas. 333.

(*u*) See *Darrell* v. *Tibbits*, 5 Q. B. D. 560, a case of fire insurance.

(*x*) As, for example, the expense of raising her, if she is an obstruction in a harbour, under 10 & 11 Vict. c. 27, s. 56; *Eglington* v. *Norman*, 46 L. J. Ex. 557.

(*y*) *Yates* v. *Whyte*, 4 Bing. N. C. 272, 283; 5 Scott, 640; *White* v. *Dobinson*, 14 Sim. 373; *Randal* v. *Cochrane*, 1 Ves. 98; *Blaanpot* v. *Da Costa*, 1 Eden, 130; *Brooks* v. *McDonnell*, 1 Y. & C. Ex. 500; *Midland Insurance Co.* v. *Smith*, 6 Q. B. D. 561; *Scaramanga* v. *Marquand*, 5 Asp. M. C. 410, 506. As to what evidence is required of the right of the insurer to sue in the name of the insured, see *The John Bellamy*, L. R. 3 A. & E. 129.

(*z*) *North of England, &c. Assurance Association* v. *Armstrong*, L. R. 5 Q. B. 244.

collision, and the underwriters paid the owners 6,000*l.*, as for a total loss. Afterwards, the underwriters, in the name of the shipowners, instituted a damage suit in the Admiralty Court against the other ship. It was held that the last-mentioned ship was solely in fault for the collision, and judgment was given against her owners for 5,683*l.* 11*s.* 7*d.*, the amount of their statutory liability. The true value of the ship insured was 9,000*l.*; and her owners claimed so much of the damages recovered in the Admiralty action as would make up the difference between the sum paid to them by the underwriters and the value of their ship. It was held that, as between the shipowner and the underwriters, the value named in the policy was conclusive, and that the underwriters were entitled to the whole of the damages, just as they would have been entitled to the ship if she had been sunk and afterwards recovered (*a*).

A vessel being insured by valued policies to the extent of two-thirds of her valuation, the assured agreed to assign to the insurers all right to recover damages for any loss paid for by them, and that the insurers should be entitled to such proportion of the damages recovered as the amount insured should bear to the valuation in the policies. The insurers paid to the assured two-thirds of the loss suffered by them in a collision for which both ships were in fault, and they released and assigned to the owners of the other ship their right to damages growing out of the collision. In an action by the owners of the insured ship against the owners of the other ship for damages from the collision, it was held by the Supreme Court of the United States that one-half of the two-thirds must be deducted from the sum recoverable by the owners of the insured ship against the other ship. In the Courts below it had been held, (1) that the whole, (2) no part, of the amount paid by the insurers should be deducted from the amount of damages recoverable against the other vessel (*b*). This conclusion was

(*a*) *North of England, &c. Assurance Association* v. *Armstrong*, L. R. 5 Q. B. 244.

(*b*) *The Potomac*, 15 Otto, 630.

arrived at by the Supreme Court upon the following considerations:—that the right of the owner of the ship sued was that which he had taken by assignment from the insurers, namely, the right to recover one-half the loss on the ship insured, and to retain such proportion of the damages recovered as the amount insured bore to the valuation in the policies, *i. e.*, two-thirds thereof. But the insurance applied to all injuries caused by any collision, whether inevitable, or by the fault of one, or of both ships. One-half of the sum paid by the insurers was therefore applicable to that half of the assured's loss for which he could recover from the other ship, and the other half to the half for which he could not recover. Therefore one-half, and one-half only, of the two-thirds of the sum paid by the insurers was to be deducted from the sum recoverable in damages from the other ship.

Assured is trustee for insurer of damages recovered in respect of the collision.

If the assured, after receiving the amount of his loss from his insurers, recovers damages from the wrong-doer in the collision, he is a trustee of such damages for the underwriter (*c*). But the fact that the plaintiff in a collision action has been compensated for his loss by his insurers is no answer to his claim for damages against the wrong-doer (*d*).

Sufferer may recover against wrong-doer notwithstanding payment by insurers.

The defendants insured their ship, *The Queen of the East*, for 1,000*l.* with the plaintiffs; and insured the freight elsewhere. The ship, while proceeding to a port of loading under a charter-party, was run into and damaged by *The Cassandra*. The defendants abandoned their ship to the plaintiffs, who settled with the defendants as for a total loss. The defendants afterwards recovered in the Admiralty Division against the owner of *The Cassandra* damages in respect of the loss of their ship and also in respect of loss of freight. It was held that the plaintiffs were not

(*c*) *Yates* v. *Whyte*, *ubi supra*.

(*d*) *Mason* v. *Sainsbury*, 3 Dougl. 61; *Yates* v. *Whyte*, *ubi supra*; *Taylor* v. *Dewar*, 4 B. & E. 58; and see *Bradburn* v. *Great Western Rail. Co.*, L. R. 10 Ex. 1.

entitled to recover against the defendants the damages recovered by them for loss of freight. The money had been paid by the defendants to the insurers on freight, and, in the opinion of the Court of Appeal, rightly so paid (*e*).

Insurers cannot recover where insured could not have recovered.

In an action in which the insured could not have recovered damages, neither can the underwriters. They have no right of action apart from him (*f*); and in a case in Admiralty before the Judicature Act it was held that they must sue in his name (*g*).

Rights of underwriters in case of collision between ships of the same owner.

Where a collision occurred between two ships belonging to the same owner, and one of them, with cargo on board not belonging to the shipowner, was sunk by the fault of the other ship, the shipowner paid into Court, under the Merchant Shipping Acts, the amount to which his liability, as owner of the wrong-doing ship, was limited. It was held, that as against the cargo-owners, underwriters upon the innocent ship, who had paid the insurance upon her, were entitled to no part of the money paid into Court (*h*). The decision would, it seems, be the same in the case of a collision between two ships owned in part by the same persons.

In *Simpson* v. *Thompson* the members of the House of Lords who addressed the House declined to express an opinion whether the ordinary marine policy covers a loss by collision with another ship belonging to the assured.

No general average contribution for damage in collision.

Damage to ship or goods by collision is not the subject of general average contribution; and insurers will not ordinarily be liable to contribute in such case. But for loss voluntarily incurred in consequence of collision, as

(*e*) *Sea Insurance Co* v. *Hadden*, 53 L. J. Q. B. 252; 13 Q. B. D. 706.

(*f*) *Simpson* v. *Thompson*, 3 App. Cas. 279.

(*g*) *The Regina del Mare*, Br. & L. 315; *The John Bellamy*, L. R. 3 A. & E. 129; *Midland Insurance Co.* v. *Smith*, 6 Q. B. D. 561.

(*h*) *Simpson* v. *Thompson*, 3 App. Cas. 279. The rights and liabilities of underwriters were very fully discussed in this case.

where gear and wreckage is cut away for the safety of the ship, the shipowner has recovered by way of general average contribution (*i*). In such a case the underwriter would be liable.

A collision between a barque and a steamship being inevitable, without fault on the part of the barque, the barque altered her course so as to strike the steamship stem on, and thereby probably saved herself from being sunk with her cargo. In consequence of the collision she had to go into a Danish port for repairs. She was arrested at the suit of the steamer, and by a decree of the Danish Court her owners were compelled to pay half the difference of the losses on the two ships. They sought to recover this sum, together with the cost of the repairs to their own ship, and of the proceedings in the Danish Court, as general average contribution from the owners of cargo. It was held by a Massachusetts Court that they could not recover (*k*).

Incidental Rights and Liabilities arising out of Collision.

Criminal liability for a collision.

Beyond incurring the civil liability for damages, the person guilty of reckless or negligent navigation, whereby a collision occurs in which life is lost, or bodily injury (*l*) suffered, may be prosecuted criminally. "Those who navigate improperly, either by too much speed, or by negligent conduct, are as much liable, if death ensues, as those who cause it on a public highway, either by furious driving or negligent conduct" (*m*). The criminal liability

(*i*) *Plummer* v. *Wildman*, 3 M. & S. 482. See also *The Ettrick*, 6 P. D. 127, as to the right of the shipowner to general average contribution from cargo-owner whose goods were sunk in collision and raised with the ship.

(*k*) *Emery* v. *Huntingdon*, 12 Amer. Rep. 725.

(*l*) As to bodily injury, see Mr. Justice Stephen's Digest of Criminal Law, Art. 211.

(*m*) *Per* Parke, B., in *Reg.* v. *Taylor*, 9 C. & P. 672, 674.

attaches only to those by whose personal misconduct or negligence the collision occurs (*n*). But where a foreign ship, in charge of an English pilot in the Thames, ran down a boat and drowned a man, and the collision was caused by the man at the helm, a foreigner, not understanding and carrying out the pilot's orders, it was held that the pilot was guilty of manslaughter, if by his own negligence he failed to make his orders understood (*o*).

The master, pilot, or any seaman of a British ship, who wilfully or negligently endangers the life of any person on board such ship, or endangers the ship herself, is guilty of a misdemeanour (*p*).

Malicious injury to a boat used for the guidance of seamen or for purposes of navigation is felony (*q*).

If a pilot when in charge of a ship negligently causes her to suffer damage, he is guilty of a misdemeanour; and if a qualified pilot, he is liable to suspension and dismissal by the authority by which he is licensed (*r*).

Infringement of the Regulations.

Where an unnecessary infringement of the Statutory Regulations for Preventing Collisions at Sea causes damage, the person in charge of the deck is guilty of a misdemeanour (*s*).

Wilful infringement of the Regulations by a master or owner is a misdemeanour punishable by fine or imprisonment. In case of damage arising from such infringement, the person in charge of the deck is liable to these penalties, unless it is proved that departure from the Regulations was necessary (*t*). And although the master or person in

(*n*) *Rex* v. *Allen*, 7 C. & P. 153; *Rex* v. *Green*, *ibid.* 156; *Reg.* v. *Barrett*, 2 C. & K. 393; *R.* v. *Haines*, *ibid.* 368; and see *Oakley* v. *Speedy*, 40 L. T. N. S. 881.

(*o*) *Reg.* v. *Spence*, 1 Cox, C. C. 352; see *London School Board* v. *Lardner*, *infra*, p. 420.

(*p*) 17 & 18 Vict. c. 104, ss. 239, 366. This Act is more lenient than some of the mediæval codes. Decapitation at the windlass, or keelhauling, was the punishment provided for negligent and incompetent pilots.

(*q*) 24 & 25 Vict. c. 97, s. 48.

(*r*) 17 & 18 Vict. c. 104, s. 366.

(*s*) 25 & 26 Vict. c. 63, ss. 27, 28; 17 & 18 Vict. c. 104, s. 518.

(*t*) 25 & 26 Vict. c. 63, ss. 27 and 28; 17 & 18 Vict. c. 104, s. 518. As to the meaning of "master"

charge of the ship is liable criminally, the owner is answerable in a civil action for damage caused by his officer's negligence (*u*).

Criminal liability where the ship or the offender is foreign, or the collision occurs abroad.

In the case of a collision caused by the criminal fault of a foreigner, or where the collision occurs abroad, if it is sought to punish the offender in this country, questions of difficulty arise as to his liability to the criminal law of England, and the jurisdiction of our Courts (*x*). The liability and jurisdiction depend upon (1) the offender's nationality; (2) the flag of the ship on board which the offence was committed; and (3) the place of collision. In the case of a person killed or injured on board one ship in a collision caused by the fault of a person on board another, the offence, if intentional, would probably be held to have been committed on board the latter; if not intentional, as where it consists in negligence, on board the former (*y*). The criminal liability for reckless or negligent navigation seems to be as follows:—If the ship is British, the offender is liable, whether a British subject or a foreigner, and wherever the collision occurs (*z*). If it occurs in the United Kingdom, or in British territory or waters, he is liable, whether a British subject or a foreigner, and whether the ship is British or foreign (*a*); if he is a British subject, and probably also if he is a foreigner (*b*),

and "owner," see s. 2 and s. 100 of the Act of 1854. As to whether an infringement of local regulations is within the penalty of these Acts, see *The Lady Downshire*, 4 P. D. 26; *The Swansea* and *The Condor*, 4 P. D. 115; *supra*, p. 58.

(*u*) See *Grill* v. *General Iron Screw Collier Co.*, L. R. 3 C. P. 476, where it was held that wilful infringement of the Regulations was not barratry within the meaning of a bill of lading.

(*x*) As to criminal negligence causing collision, see *supra*, p. 297.

(*y*) See the judgment of Cockburn, C. J., in *Reg.* v. *Keyn*, 2 Ex. D. 63, 232 *seq.* But see also the judgments of Denman, J., and Lord Coleridge, C. J., *ibid.* pp. 101, 158; and *per* Melliah, L.J., *The M. Moxham*, 1 P. D. 107, 112.

(*z*) *Reg.* v. *Sattler*, D. & B. C. C. 525; *Reg.* v. *Anderson*, L. R. 1 C. C. R. 161; *Reg.* v. *Carr*, 10 Q. B. D. 76; *Rex* v. *Jernot*, Russell on Crimes, 6th ed. p. 11, note. As to what is sufficient evidence of the ship being British, see *Reg.* v. *Seberg*, L. R. 1 C. C. R. 264.

(*a*) *Cunningham's Case*, Bell's C. C. 220, 234; 4 Phillimore's International Law, 2nd ed. 767.

(*b*) See *Reg.* v. *Anderson*, *ubi supra*; *Reg.* v. *Menham*, 1 F. & F. 369.

whether he is a member of the ship's company or not (*c*), and the ship British, or if within three months of the offence he has been employed on board a British ship, he is liable wherever the collision occurs (*d*); if he is a British subject, and the ship British, he is liable if the collision occurs in a foreign port or harbour (*e*); if he is a foreigner, and the ship British, he is liable if the collision occurs on the high seas; if he is a British subject, and the ship British or foreign, and also, perhaps, if he is a foreigner, and the ship British, he is liable if the collision occurs out of, and the injured person dies within, England or Ireland (*f*); if he is a British subject, and the ship a foreign ship to which he does not belong, he is liable if the collision occurs elsewhere than in the Queen's dominions (*g*); and lastly, if he is a foreigner and the ship foreign, he is liable if the collision occurs within three miles of low-water mark on the shores of the United Kingdom (*h*).

Officer's certificate may be cancelled.

If a collision involving loss of life or serious damage to either ship is caused by the wrongful act or default of an officer holding a Board of Trade certificate, his certificate may be cancelled or suspended at a Board of Trade inquiry (*i*).

Salvage after collision.

One of the consequences of negligence causing collision is that the wrong-doer cannot recover salvage remuneration for service rendered to the ship with which he has been in collision, although the latter is also in fault for the colli-

(*c*) See *Reg.* v. *Carr*, 10 Q. B. D. 76.

(*d*) 17 & 18 Vict. c. 104, s. 267.

(*e*) 18 & 19 Vict. c. 91, s. 21.

(*f*) 24 & 25 Vict. c. 100, s. 10. This Act does not apply to foreigners on board foreign ships: see *Reg.* v. *Lewis*, 1 D. & B. C. C. 182, decided upon 9 Geo. 4, c. 31; and *per* Cockburn, C. J., in *Reg.* v. *Keyn*, 2 Ex. D. 63, 171. See *Reg.* v. *Dodd*, 2 Johnson's New Zealand Rep. 598, as to jurisdiction of colonial court to try a British subject for an offence at sea on board a foreign ship: 12 & 13 Vict. c. 96; 30 & 31 Vict. c. 124, s. 11.

(*g*) 30 & 31 Vict. c. 124, s. 11.

(*h*) 40 & 41 Vict. c. 73.

(*i*) 17 & 18 Vict. c. 104, s. 242; 25 & 26 Vict. c. 63, s. 23. As to the master's liability in respect of his certificate when a pilot is on board, see *supra*, pp. 257 *seq.*

sion (*k*); nor, *d fortiori*, can he claim salvage against the innocent owner of cargo on board her. Nor can a tug recover salvage reward for assistance rendered to a ship with which her tow has been in collision by the fault of herself, the tug (*l*). An innocent ship may recover salvage for services rendered to another which has negligently run into her. The law which makes it the duty of a ship which has been in collision with another to stand by her, and render assistance, does not prevent her from recovering salvage reward for assistance so given (*m*). A tug is entitled to salvage remuneration from one of two ships in collision to which she renders assistance by towing the other clear (*n*). And it seems that, upon the same principle, a vessel would be entitled to salvage remuneration for holding one ship off another towards which she is driving.

Salvage for towing ships clear of each other.

A salvor damaged, without negligence on her own part, by collision with the vessel she is assisting, may recover against the latter (*o*); and a vessel engaged in rendering a salvage service to another does not forfeit her right to salvage by going into collision with the other, even though there was negligence on her part such as to make her liable in damages for the collision (*p*).

Tug or salvor in collision with the vessel she is assisting.

Where two vessels were in collision, and entangled together in a position dangerous to both, the propeller of one being foul of the chain cables of the other, a tug

(*k*) *Cargo ex Capella*, L. R. 1 A. & E. 356, followed in *The Castle Rising*, Ad. Div. March, 1886; *The Ettrick*, 6 P. D. 127; and see *The Glengaber*, L. R. 3 A. & E. 534. The rule is the same in America: *The Clarita*, 23 Wall. 1; *The Sampson*, 4 Blatchf. 28.

(*l*) *The Glengaber*, *ubi supra*.

(*m*) *The Retriever* and *The Queen*, 2 Mar. Law Cas. O. S. 555.

(*n*) *The Vandyck*, 7 P. D. 42.

(*o*) *The Mud Hopper*, 40 L. T. N. S. 462.

(*p*) *The C. S. Butler* and *The Baltic*, L. R. 4 A. & E. 178. In *The Diana*, 2 Asp. M. L. C. 366, the owners of a ship which had been found to blame for collision with another ship whereby injury was occasioned to the latter, were allowed to intervene for their own protection in a salvage suit instituted by third parties against the injured ship, and to put in bail and have the conduct of the defence.

which, by towing ahead the vessel at anchor, enabled her to slip from her anchors, and so get clear from the vessel which was foul of her, was held to be entitled to recover salvage reward from both vessels (*q*).

The fact that some of the owners of a ship that rendered salvage service to another were also owners of the ship whose negligence had done the mischief, and rendered the service necessary, was held not to deprive the salving ship of the right to salvage remuneration (*r*). Sir R. Phillimore said:—"I know of no authority for the proposition that a vessel wholly unconnected with the act of mischief is disentitled to salvage reward simply because she belongs to the same owners as the vessel that has done the mischief."

Collision with tow by fault of tug is breach of towage contract.

If by the negligence of those on board a tug in the performance of the towage the ship in tow is damaged by collision with a third ship, or damages a third ship, and is compelled to make such damage good, there is a breach of the towage contract, and the tug can recover nothing in respect of the towage service (*s*). And we have seen (*t*) that, beyond forfeiting their right to remuneration, the owners of the tug and the tug herself, are liable to the owners of the tow for the loss. Where a vessel in tow is injured in a collision, and has to stop and repair her damages, the tug is not entitled in a towage action to further remuneration beyond the sum agreed for towage, because she voluntarily stands by whilst the repairs are being effected, and then completes the towage (*u*).

General average contribution.

Damage received in a collision by a ship or cargo is not the subject of general average contribution; and this is so whether the ship was in fault for the collision or not. But loss voluntarily incurred for the benefit of all concerned

(*q*) *The Vandyck*, 7 P. D. 42.
(*r*) *The Glengaber*, L. R. 3 A. & E. 534.
(*s*) *The Christina*, 3 W. Rob. 27. *Semble*, *aliter* where the contract is for salvage service: *The C. S. Butler*, L. R. 4 A. & E. 178.
(*t*) *Supra*, p. 201.
(*u*) *The Hjemmett*, 4 Asp. Mar. Law Cas. 274; 5 P. D. 227.

after and in consequence of a collision for which the ship was not in fault (*x*), and salvage expenses incurred under the same circumstances (*y*), may be recovered as general average. The owners of a ship sunk in a collision by her own fault cannot recover by way of general average contribution from cargo owners any part of the expense of raising the cargo (*z*).

Expense of raising ship sunk in collision.

If a ship after collision sinks, her owners are in some places liable under local Acts to the harbour authority or other public body for the expense of raising her; and such expense may sometimes be recovered by the authorities by sale of the ship and cargo (*a*).

Penalty for injuring lightship.

If a vessel wilfully or negligently injures a lightship, she incurs, in addition to her liability for damages, a penalty of 50*l.* (*b*).

Rights of holder of bottomry bond on freight.

As to the right of the holder of a bottomry bond on freight to share in the amount of the wrong-doing shipowner's statutory liability, see above, p. 180.

(*x*) See *Plummer* v. *Wildman*, 3 M. & S. 482. This case was much discussed in *Attwood* v. *Sellar*, 5 Q. B. D. 286.

(*y*) See *per* Brett, M. R., in *The Ettrick*, 6 P. D. 127; *Kemp* v. *Halliday*, L. R. 1 Q. B. 520. But see *Greer* v. *Poole*, 5 Q. B. D. 272.

(*z*) *The Ettrick*, 6 P. D. 127; cp. *Seramanga* v. *Marquand*, 5 Asp. M. C. 410, 506, as to the rights of the cargo owner and his underwriters, *supra*, p. 293.

(*a*) As to the Thames, see *The Ettrick*, *supra*; 40 & 41 Vict. c. 16; 20 & 21 Vict. c. 147 (Local).

(*b*) 17 & 18 Vict. c. 104, s. 414. The risk of collision in frequented waters is shown by the fact that in five years ending 31st Dec., 1881, forty-eight lightships were injured by collision; seventy-nine were injured in the six and a-half years preceding 1887; an average of twelve are run down every year. Some of these collisions occur in fine weather and daylight from mere inattention. See Naut. Mag. 1882, p. 199; evidence before Committee on Electrical Communication between Lightships and the Shore (1887).

CHAPTER XII.

PRACTICE.

Service of writ out of the jurisdiction.

NEITHER in the Admiralty (*a*) nor in the Queen's Bench Division (*b*) can a personal action for damages, in respect of a collision occurring below low-water mark of the United Kingdom, be brought against a person not domiciled or ordinarily resident within the jurisdiction (*c*), unless the writ of summons be served within the jurisdiction. In such a case, service of the writ out of the jurisdiction will not be ordered.

Address of writ.

A writ addressed to a person resident abroad, and intended to be served upon his coming within the jurisdiction, will not be set aside merely because it describes him as having an English address (*d*). A writ addressed to a foreign corporation without any further description than the style of the corporation, will be set aside (*e*).

By whom to be served.

In an action *in rem*, the writ of summons was served in the manner provided by Ord. IX. r. 12. No appearance was entered, and the action came on for judgment by default under Ord. XIII. rr. 12, 13. The writ had been served by the solicitor's clerk, who made the affidavit of service. It was held that the service was valid, and that service by the marshal or his substitute was not necessary (*f*).

(*a*) *In re Smith*, 1 P. D. 300; *The Vivar*, 2 P. D. 29; *The Helenslea*, 7 P. D. 57.

(*b*) *Harris* v. *Owners of the Franconia*, 2 C. P. D. 173.

(*c*) Ord. XI. r. 1, sub-s. (c).

(*d*) *The Helenslea*, *ubi supra*.

(*e*) *The W. A. Scholten*, 13 P. D. 8.

(*f*) *The Solis*, 10 P. D. 62.

Ord. XIX. r. 28, of the Rules of the Supreme Court, 1883, is as follows:—

"In actions in any Division for damage by collision (*g*) between vessels, unless the Court or a judge shall otherwise order, the solicitor for the plaintiff shall, within seven days after the commencement of the action, and the solicitor for the defendant shall, within seven days after appearance and before any pleading is delivered, file with the registrar, master, or other proper officer, as the case may be, a document, to be called a preliminary act, which shall be sealed up, and shall not be opened until ordered by the Court or a judge, and which shall contain a statement of the following particulars:— Preliminary acts.

(a) The names of the vessels which came into collision, and the names of their masters;
(b) The time of the collision;
(c) The place of the collision;
(d) The direction and force of the wind;
(e) The state of the weather;
(f) The state and force of the tide;
(g) The course and speed of the vessel when the other was first seen;
(h) The lights (if any) carried by her;
(i) The distance and bearing of the other vessel when first seen (*h*);
(k) The lights (if any) of the other vessel which were first seen;
(l) Whether any lights of the other vessel, other than those first seen, came into view before the collision;
(m) What measures were taken, and when, to avoid the collision;
(n) The parts of each vessel which first came into contact.

The Court or a judge may order the preliminary act to be opened, and the evidence to be taken thereon without its being necessary to deliver any pleadings; but in such case,

(*g*) Under the former practice preliminary acts were required in "all cases of damage." Ad. Ct. Rules, 1859, rr. 62—64.

(*h*) In *The Godiva*, 11 P. D. 20, this was insufficiently stated.

if either party intends to rely on the defence of compulsory pilotage, he may do so, and shall give notice thereof in writing to the other party within two days from the opening of the preliminary act."

This enactment applies to actions for loss of life by collision under Lord Campbell's Act; in such an action preliminary acts must be filed (*k*). But no preliminary act is required in an action by the owner of a ship in tow against the owner of her tug for negligent towage, whereby a collision was caused between the tow and a third ship (*l*). Though, in the absence of evidence that it was impossible to file a preliminary act, it was held necessary in an action by the owner of cargo on board a barge against a ship with which the barge was in collision (*m*). In an action by the owners of cargo against the carrying ship for damage to cargo by collision caused by the fault of the carrying ship, no preliminary act is necessary (*n*). It has been said that it will be required in an action by the owner of a ship in tow against the owner of the tug for negligent towage whereby a collision occurs between tug and tow (*o*).

Object of preliminary acts.

The object of the preliminary act was explained by Dr. Lushington in *The Vortigern* (*p*). "Preliminary acts were instituted for two reasons—to get a statement from the parties of the circumstances *recenti facto*, and to prevent the defendant from shaping his case to meet facts put forward by the plaintiff." Consequently, the Court will not allow a party before (*q*) or at (*r*) the hearing to depart from or amend (*q*) his preliminary act.

(*k*) *Webster* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.*, W. N. 1884, p. 1.

(*l*) *Armstrong* v. *Gaselee*, 22 Q. B. D. 250.

(*m*) *Secretary of State for India* v. *Hewett*, 6 Asp. M. C. 384. There had been an action in Admiralty between the barge and the ship. This is the case referred to by Huddleston, B., in *Armstrong* v. *Gaselee*, 22 Q. B. D. 252.

(*n*) *The John Boyne*, 3 Asp. M. L. C. 341.

(*o*) *Per* Wills, J., in *Armstrong* v. *Gaselee*, 22 Q. B. D. 250, 253.

(*p*) Sw. 518.

(*q*) *The Miranda*, 7 P. D. 185.

(*r*) *The Frankland*, L. R. 3 A. & E. 511; *The Vortigern*, Sw. 518.

Proof must be *secundum allegata.*

It was a rule of the Admiralty Court, and the rule is still enforced by the Admiralty Division, that a plaintiff in framing his statement of claim must state the circumstances of the collision, so far as they are known to him (*s*), with sufficient clearness and accuracy to enable his adversary to know the case which he has to meet (*t*). Where the plaintiff's allegations have been such as to mislead the defendant upon essential points, it was, before the Judicature Act, and doubtless would still be, held that the plaintiff is not entitled to recover. The particular acts of negligence which caused the collision must be stated in specific terms. If the plaintiff alleges that the collision was caused by the starboarding of the helm of the defendant ship, and the proof be that the helm was never starboarded, the plaintiff would probably fail to recover, although it is proved that his adversary's ship was in fact alone to blame (*u*). But the rule that proof must be *secundum allegata* is enforced only so far as the *allegata* are material (*x*); in other words, so far as the non-observance of the rule has made it impossible for the defendant to meet the case brought against him.

Infringement of Regulations must be specifically alleged.

If any of the Regulations for Preventing Collisions at Sea have been infringed, it is the practice, and it would seem to be necessary (*y*), for the plaintiff to specify which they are. In the absence of such an allegation in his pleadings it is conceived that evidence of the infringement would not be admitted (*z*). But it is not essential that the plaintiff

(*s*) As to when they are not known, see *The Schwalbe*, Sw. 521; *The England*, 5 Not. of Ca. 174.

(*t*) The whole subject is exhaustively dealt with in Williams & Bruce, Admiralty Practice, 2nd ed. pp. 338 *seq.*, and see Ord. XIX. r. 4.

(*u*) It was so held before the Judicature Acts: *The Ann*, Lush. 65; *The Marpesia*, L. R. 4 P. C. 212; *The North American*, Sw. 358; *The Hascell*, Br. & L. 247. See also *The Hochung* and *The Lapwing*, 7 App. Cas. 512.

(*x*) *The Alice and Rosita*, L. R. 2 P. C. 214.

(*y*) *The Ebenezer*, 2 W. Rob. 206, 211; *The Bothnia*, Lush. 52, 54.

(*z*) In *The Perim*, Ad. Div. 10th Nov., 1886, Sir J. Hannen allowed an amendment of the statement of claim at the trial by inserting a charge of breach of the "starboard side" rule. Cp. *The Lady Ann*, 7 Not. of Ca. 364, 370, where under special

should prove all the allegations made in his statement of claim; if he proves the material part of the case alleged, it will be sufficient (*a*). An allegation that the defendant ship was alone in fault does not prevent the plaintiff from obtaining a judgment for half his loss upon proof that both ships were in fault (*b*).

Defence.

The defendant in his defence, besides traversing all the allegations of the plaintiff he intends to deny, should state the circumstances of the collision (*c*). Thus, if the defence is that the plaintiff gave him a foul berth, he must so plead. Before the Judicature Acts it was held that it was not sufficient for him simply to traverse the plaintiff's statements (*d*). But the plaintiff must prove his case, and where he fails to do so, he will not succeed merely because the defendant has in his defence told a story of the collision which he fails to prove (*e*). Where the defence is "inevitable accident," it is usual in terms so to plead; but it is conceived that this is not necessary (*f*). If the defence is "compulsory pilot," it is the practice, and it would seem to be necessary, for the defendant to plead it (*g*).

Judgment at law: whether it can be pleaded in Admiralty.

Prior to the Judicature Acts it was held that a verdict and judgment in an action at law that one of two ships, B., was in fault for the collision, and that the defendants, her owners, were liable to the plaintiffs for the amount of their loss, were no bar to subsequent proceedings in Admiralty *in rem* against the ship A. by the defendants in the

circumstances the defendant ship was found to blame for a failure to port which was not alleged in the pleadings.

(*a*) *The Amalia*, Br. & L. 311, 314. See also *The Despatch*, Lush. 98; *The Lady Ann*, 7 Not. of Ca. 370; *The England*, 5 Not. of Ca. 170; *The East Lothian*, Lush. 241, 248.

(*b*) *The Aurora* and *The Robert Ingram*, Lush. 327, 329.

(*c*) For the old practice, see *The Virgil*, 2 W. Rob. 204; *The Ironmaster*, 6 Jur. N. S. 782.

(*d*) *The Why Not*, L. R. 2 A. & E. 265.

(*e*) See *The East Lothian*, Lush. 241.

(*f*) See *The E. Z.*, 33 L. J. Ad. 200; *The England*, 5 Not. of Ca. 170, 174.

(*g*) For the old practice, see *The Canadian*, 1 W. Rob. 343; *The Northampton*, 1 Sp. E. & A. 155, n.; *The Alhambra*, Br. & L. 286; *The European*, Williams and Bruce, 2nd ed. 352, note (*t*).

common law action; and that the judgment at law could not be pleaded or given in evidence in the Admiralty action (*h*). It is difficult to reconcile this decision with the principle that a decision in the presence of the parties upon the merits is *res judicata;* a principle which seems to apply whether the judgment is at law or in Admiralty proceedings *in rem.* Where a defendant at law pleaded a decree of the Admiralty Court upon the merits in his favour, it was held that the plea was bad, because it did not show that the Admiralty Court had jurisdiction (*i*).

Foreign judgment.

As to the effect in the Courts of this country of a foreign judgment in action relating to the collision, see above, p. 224.

Evidence.

The following points have been decided with regard to evidence admissible in collision actions.

Logs.

Notwithstanding the terms of 17 & 18 Vict. c. 104, ss. 282, 285, the official log is not evidence for the ship (*k*), nor is the ship's log, though the mate who wrote it is dead(*l*). But both these documents often afford valuable evidence against the ship (*m*).

Result of proceedings at inquiry, &c.

The result of proceedings at an inquiry under the Merchant Shipping Acts (*n*); at a naval court martial (*o*); at an inquiry by a pilotage authority (*p*); or at a coroner's inquest (*q*),—is irrelevant in a collision action.

(*h*) *The Clarence*, 1 Sp. E. & A. 206; but see *per* Knight-Bruce, L. J., 1 Sp. E. & A. 209, n.; and see *The Ann and Mary*, 2 W. Rob. 189; *semble*, the case referred to in *The Clarence*. See also *The Sylph*, L. R. 2 A. & E. 24; *The Antelope*, L. R. 4 A. & E. 33; *The Due Checchi*, L. R. 4 A. & E. 35, n.

(*i*) *Harris* v. *Willis*, 15 C. B. 710.

(*k*) *The Europa*, 13 Jur. 856; *The Malta*, 2 Hag. 158, note; *The Earl of Dumfries* (engineer's log), 10 P. D. 31.

(*l*) *The Henry Coxon*, 3 P. D. 156. In *The Singapore*, L. R. 1 P. C. 378, the ship's log, though objected to, appears to have been used as evidence for the ship.

(*m*) See observations by Westbury, C., in *The Singapore*, *supra*, as to the value of the ship's log as evidence against the ship, and as to alterations discrediting the log.

(*n*) *The Mangerton*, Sw. 120; *The City of London*, Sw. 245.

(*o*) *H.M.S. Swallow*, Sw. 30; the report of a naval officer to the Lords of the Admiralty is privileged as a State document, and no order to produce it will be made.

(*p*) *The Lord Seaton*, 2 W. Rob. 391.

(*q*) *The Mangerton*, Sw. 120.

Protest; deposition before receiver of wreck.

A protest (*r*), and a deposition made before a receiver of wreck, though the master has died since making it (*s*), are not admissible in evidence, except in cross-examination for the purpose of contradicting a witness who denies or does not admit having made them. It seems that the original depositions taken before the receiver must be produced, and that copies cannot be put in (*t*).

Coastguard and lightship logs.

Copies of entries in the official journals kept by coastguardsmen, and copies of entries in lighthouse and lightship logs relating to the weather, are usually admitted in the Admiralty Division upon production of an affidavit by the proper officer (*u*).

Statements by master; by seamen, and others.

Statements by the master as to matters in issue are admitted to prove the facts stated against the owner (*x*); but not statements by other officers, by seamen (*y*), or by the pilot (*z*), though statements by seamen and others on board, made at the moment of collision, have in some cases been admitted as part of the *res gestæ* (*a*).

Letter by master to owner.

In an action by cargo-owner against shipowner for loss of cargo by stranding, a letter written by the master to

(*r*) *Christian* v. *Coombe*, 2 Esp. 489; *The Ljudica*, 23 L. T. N. S. 474; *The Emma*, 2 W. Rob. 315; *The Hedwig*, 1 Sp. E. & A. 19. As to the value of such evidence, see *The Osmanli*, 7 Not. of Cas. 507, 510.

(*s*) *The Little Lizzie*, L. R. 3 A. & E. 56; *Nothard* v. *Pepper*, 17 C. B. N. S. 39; *The Henry Coxon*, *ubi sup.* As to inspection of copies of these depositions furnished to the adverse party by the Board of Trade: *The Palermo*, 9 P. D. 6.

(*t*) It was so held by Butt, J., in *The Risca*, 25th March, 1886; *The Benayo*, 29th March, 1886; and (*semble*) by Dr. Lushington in *The Emperor* and *The Zephyr*, 12 W. R. 890; *The Oscar*, 12 W. R. 872; but see *The Oscar*, 10 L. T. N. S. 789, differently reported. See also *per* Tindal, C. J., *Bastard* v. *Smith*, 10 A. & E. 213, 214; *Davies* v. *Davies*, 9 C. & P. 252; *Highfield* v. *Peake*, M. & M. 109; *Burnand* v. *Nerot*, 1 C. & P. 578; *Ewer* v. *Ambrose*, 4 B. & C. 25; 1 Roscoe, N. P. 15th ed. 168, 169.

(*u*) An examined copy is sufficient: *The Maria des Dores*, Br. & L. 27; *The Catherina Maria*, L. R. 1 A. & E. 53.

(*x*) *The Midlothian*, 15 Jur. 806; *The Manchester*, 1 W. Rob. 63; *The Europe*, 13 Jur. 856; *The Actæon*, 1 Sp. E. & A. 176; *The Solway*, 10 P. D. 137. And so in America: *The Potomac*, 8 Wall, 590.

(*y*) *The Lord Seaton*, 2 W. Rob. 391, 393; *The Foyle*, Lush. 10; and see *The Great Eastern*, Holt, 169.

(*z*) *The Lord Seaton*, 2 W. Rob. 391, 393; *The Schwalbe*, Sw. 521.

(*a*) *The Schwalbe*, Sw. 521; *The Mellona*, 10 Jur. 992.

the shipowner, detailing the facts of the stranding, was admitted as evidence of those facts (*b*).

Evidence in a previous action for the same collision, but between different parties, is not admissible in the subsequent action (*c*). But where, after judgment in an action by the owner of ship A. against the owner of ship B., the latter sued the former in a fresh action for the same collision, evidence in the first action was allowed to be read in the subsequent action (*d*). Evidence in previous action.

As to the mode of proving the Regulations for Preventing Collisions at Sea, see 25 & 26 Vict. c. 63, s. 26 (*infra*, p. 341). Regulations; how proved.

Where the defence raised is that of "compulsory pilot," and the defendant has reason to think that the pilot will be a hostile witness upon the facts of the collision, the proper course for him to take is to subpœna the pilot to produce his licence, and to be provided with evidence identifying him with the person named in the licence (*e*). Proof of compulsory pilotage where pilot is hostile.

There was at one time a doubt whether, in a collision action, interrogatories with respect to matters stated in the preliminary acts and the other circumstances of the collision, could be administered. It was decided that such interrogatories are admissible (*f*). They are, however, seldom used in practice. Interrogatories.

In answering interrogatories, a defendant in a collision action must answer as to matters touching the collision which are in the knowledge of their servants or agents, the master and crew (*g*). Answering interrogatories.

It was formerly the practice, in the Court of Admiralty, where the plaintiff's ship was at anchor, or where the sole Who to begin in collision action.

(*b*) *The Solway*, 10 P. D. 137; see *The Neptune the Second*, 1 Dods. 467, 469.

(*c*) *The William Hutt*, Lush. 25; *The Demetrius*, L. R. 3 A. & E. 523.

(*d*) *The North American*, Lush. 80; *The Rosendale*, 2 Pritch. Ad. Dig. (ed. 1865) 591; see Ord. XXXVII. r. 3, and notes in Annual Practice.

(*e*) See above, p. 239.

(*f*) *The Biola*, 34 L. T. N. S. 135.

(*g*) *The Radnorshire*, 5 P. D. 172; *The Isle of Cyprus*, 15 P. D. 134 (crew of plaintiff's ship drowned).

defence was inevitable accident, for the defendant to begin. This practice has been changed, and the rule now is that plaintiff shall in all cases begin (*h*); or, at least, in all cases where (as, *semble*, is always the case) the onus of proof is upon him (*i*).

Order to inspect.

Power is given to any party to an Admiralty action to apply for an order for inspection of any ship or other personal or real property, the inspection of which may be material to the issue of the action (*k*). This power was exercised, in *The Magnet*, with reference to ships' lights (*l*); also in *The Germania* (*m*). In a recent case (*n*), it was held that the order will not be made where the party applying has an opportunity of proving the facts by evidence in the ordinary way.

Nautical assessors: evidence of experts not admissible.

In the Court of Appeal and in the Admiralty Division, nautical assessors advise the Court upon questions of seamanship. In the Queen's Bench Division, assessors are not, in practice, but may be (*o*), called in. In the Queen's Bench Division, matters of seamanship may be proved by experts; in Admiralty, and, it seems, in any Court where assessors are present to advise the Court, such evidence is not admissible (*p*). In a recent case, evidence directed to show what was the usual mode of navigating ships in the entrance to the Mersey was held to be inadmissible in the Admiralty Division (*q*).

Function of assessors.

The function of the assessors is not to decide questions of

(*h*) See *The Otter*, L. R. 4 A. & E. 203; *The Benmore*, L. R., 4 A. & E. 132.

(*i*) See *supra*, p. 30, as to onus of proof.

(*k*) 24 Vict. c. 10, s. 18; and see now Ord. L. r. 3, of the R. S. C. 1883.

(*l*) L. R. 4 A. & E. 417, 428.

(*m*) 3 M. L. C. O. S. 140, 269.

(*n*) *The Victor Covacevitch*, 10 P. D. 40.

(*o*) 36 & 37 Vict. c. 66, s. 56.

(*p*) *The Gazelle*, 1 W. Rob. 471; *The Ann and Mary*, 2 W.Rob. 189, 196; *The No*, 1 Sp. E. & A. 184; *The Sir Robert Peel*, 4 Asp. M. L. C. 321; *The Earl Spencer*, L. R. 4 A. & E. 431; *The Assyrian*, 63 L. T. N. S. 91.

(*q*) *The Kirby Hall*, 8 P. D. 71. But in *The Velocity*, L. R. 3 P. C. 44, such evidence (with reference to the Thames) was admitted. See also *The Andalusian*, 2 P. D. 231, as to proof of usual precautions at a launch in the Mersey. It seems that the Court will take the opinion of the assessors upon such points: *The Cambria*, *infra*, 467.

fact arising in the case, but to advise the Court upon nautical matters (*r*). The decision of the case rests entirely with the judge. Even in purely nautical matters he is not bound to follow the advice of his assessors, if it does not agree with his own opinion (*s*), though their advice will be rarely questioned (*t*). The advice of the Trinity Brethren in the Admiralty Division upon a question of pure seamanship does not conclude the case, and may give rise to an appeal (*u*). If the Trinity Brethren differ in opinion, the Court has on more than one occasion obtained the opinion of one or more of the other Brethren (*v*). In a case where the judge differed in opinion from the Trinity Brethren, and they reduced their views and the reasons for them to writing, and at his request preserved them in case the Court of Appeal should call for them, that Court refused to order the Admiralty registrar to deliver to the appellants a copy of those reasons (*x*).

Plaintiff unsuccessful at law, or whose judgment is satisfied, cannot afterwards sue in Admiralty.

He cannot sue at law and in Admiralty at same time.

A plaintiff who has been unsuccessful in an action at law tried upon the merits (*y*), or who has received payment of the sum for which he obtained judgment (*z*), cannot afterwards proceed against the ship in Admiralty for the same collision; nor would he be allowed to sue at law and in Admiralty at the same time for the same collision (*a*).

(*r*) See *The Hannibal*, L. R. 2 A. & E. 56, as to the practice of the judge in taking the opinion of his assessors.

(*s*) See *The Magna Charta*, 1 Asp. M. L. C. 153; *The Aid*, 6 P. D. 84; *The Beryl*, 9 P. D. 137, 141. Both Dr. Lushington (7 Not. of Cas. 354), and a present judge of the Admiralty Division, have taken this view.

(*t*) "It would be impertinent in a judge not to consider as almost binding upon him the opinion of the nautical gentlemen who, having ten times his own skill, are called in to assist him." *Per* Brett, M.R., *The Beryl*, 9 P. D. 137, 141.

(*u*) See *The Falkland*, Br. & L. 204.

(*v*) *The Magna Charta*, 1 Asp. M. L. C. 153; *The Friends' Goodwill* and *The Peggy*, *supra*, p. 151.

(*x*) *The Banshee*, 6 Asp. M. C. 130.

(*y*) See *The Griefswald*, Sw. 430, 435.

(*z*) *The Orient*, L. R. 3 P. C. 696.

(*a*) *The John and Mary*, Sw. 471. In this respect the rights of a person entitled to a maritime lien differs from those of a mortgagee, who may pursue all his remedies at once: Fisher on Mortgages, 3rd ed. 321.

Consolidation of actions: cross actions.

In order to avoid multiplicity of actions, where the owners of two ships that have been in collision institute separate or cross actions against each other, the Court will consolidate the two actions (*b*), or by consent the two actions may be heard upon the same evidence.

Consolidation: actions by different plaintiffs against the same defendant.

Actions by different plaintiffs in respect of the same collision against the same ship or the same defendants may be consolidated in Admiralty, even as against an unwilling defendant, or at the instance of the defendant as against an unwilling plaintiff (*c*). And where two ships belonging to the same owners, one being disabled and in tow of the other, fouled a third ship, several actions by the owners and by the master and crew of the third ship against the two ships that fouled her were consolidated (*d*).

This practice of consolidating actions, which appears to have been peculiar to the Court of Admiralty, has been continued since the Judicature Acts by the Admiralty Division. Thus, recently an action by the owner of ship A. and an action by the owner of cargo on board A. against the owner of ship B., with which A. had been in collision, were consolidated (*e*).

Where the actions are *in personam* and in one of them service of the writ has not been effected, consolidation will not be ordered (*f*).

Although it has the power to force consolidation upon unwilling parties, the present practice of the Admiralty Division is not to exercise that power (*g*); but a plaintiff who unreasonably objected to consolidation and afterwards

(*b*) Jud. Act, 1873, s. 24, sub-s. 7. See *Thomson* v. *S. E. Rail. Co.*, 9 Q. B. D. 320. So 24 Vict. c. 10, s. 34, gave the Admiralty Court the same power.

(*c*) *The William Hutt*, Lush. 25; *The Melpomene*, L. R. 4 A. & E. 129; *The Falk*, 4 Asp. M. L. C. 592. *The Cumberland*, 5 L. T. N. S. 496.

(*d*) *The American* and *The Syria*, L. R. 4 A. & E. 226.

(*e*) *The Hector*, 8 P. D. 218. As to the effect of 24 Vict. c. 10, s. 34, see *The Demetrius*, L. R. 3 A. & E. 523.

(*f*) *The Helenslea*, 7 P. D. 57.

(*g*) *The Jacob Landstrom*, 4 P. D. 191; *The Vildosala*, 4 Asp. M. L. C. 228; *The Pasithea*, 5 P. D. 5; and see *The William Hutt*, *ubi supra*.

succeeded in his action, has been ordered to bear the costs occasioned by his objecting to consolidation (*h*).

The power of consolidating actions above referred to is wider than that conferred upon the several Divisions of the High Court of Judicature by Ord. XLIX. r. 8, which is exerciseable only at the instance of defendants (*i*). The practice which is adopted in other Divisions of trying one of several actions by different plaintiffs against the same defendants as a test action (*k*) does not appear to have been ever in use in Admiralty.

Plaintiff lying by to await judgment in other action.

Where the rights and liabilities of the parties can be fairly settled in the usual way upon claim and counterclaim, a party who, before bringing his action, awaits the decision of an action in respect of the same collision in which he is defendant, does so at the risk of having to pay costs (*l*).

Where cross actions were tried before juries in a common law court, with the result that contradictory verdicts were obtained, and each party applied for a new trial, it was said by the Privy Council that if the evidence in each action was such that a jury might reasonably find either way, the two actions ought to be tried again, not separately, but together (*m*).

Cross actions: one ship arrested, the other not: stay of proceedings.

Where there are cross actions or action and counterclaim, and the defendant ship in the principal action is arrested, if the plaintiff ship has been lost or for some other reason cannot be arrested, her owner will not be permitted to prosecute his action until he gives security for the amount claimed against him in the cross action (*n*), or counterclaim (*o*). This rule has been applied where the parties

(*h*) *The Lord Strathnairn*, cited Williams & Bruce, 2nd ed. 387; and see *The Nicolina*, 2 W. Rob. 175; *The Bartley*, Sw. 198.

(*i*) Annual Practice, Ord. XLIX. r. 8. note; Archb. Pr. 407 *seq*; 2 Chitty, Pr. 1085 *seq*.

(*k*) See *Amos* v. *Chadwick*, 4 Ch. D. 867; *Bennett* v. *Lord Bury*, 5 C. P. D. 339.

(*l*) *The Calypso*, Sw. 28; *The Breadalbane*, 7 P. D. 186; *The Julia Fisher*, 2 P. D. 115.

(*m*) *Australian Steam Navigation Co.* v. *Smith & Sons*, *The Birksgate* and *The Barrabool*, 14 App. Cas. 321, 324.

(*n*) 24 Vict. c. 10, s. 34; *The Charkieh*, L. R. 4 A. & E. 120.

(*o*) *The Breadalbane*, 7 P. D. 186;

are foreigners resident abroad (*p*), against a British subject resident in England (*q*), and against a foreign sovereign whose ship was privileged from arrest (*r*). The Act 24 Vict. c. 10, s. 34, which enables the Court to stay proceedings in this case applies only to actions *in rem*; the wording of the section shows that it has no application to actions *in personam* (*s*).

Cross actions: one in County Court, the other in Supreme Court: transfer of County Court action.

Where actions in respect of the same collision are pending in the Admiralty Division and in a County Court at the same time, the practice is for the latter Court upon application in that behalf being made to it under 31 & 32 Vict. c. 71, s. 6 (County Courts Admiralty Jurisdiction Act, 1868), to order that the County Court action be transferred to the Admiralty Division. The conduct of the consolidated action will usually be given to the plaintiff in the action which was first instituted (*t*).

Separate actions for damage to property, and for injury to person.

Damage to ship or goods and injury to person may be sued for in separate actions though caused by the same negligent act, in the same collision, at the same time, and to the same person (*u*).

Action *in personam* against pilot.

Before the Judicature Acts, the Court of Admiralty refused to entertain an action *in personam* against a pilot (*x*); but since the passing of those Acts, there is no objection on the ground of jurisdiction to bringing such an action in the Admiralty Division. Accordingly the Court has, in the absence of objection by the defendant, entertained an action *in rem* in which the pilot has been added as a defendant (*y*). But it has been held (*z*), that the Court will

The Julia Fisher, 2 P. D. 115; *The Newbattle*, 10 P. D. 33. Cf. *The Carnarvon Castle*, 3 Asp. M. C. 607, and disting. *The Alne Holme* (2nd action), 4 *ibid.* 592.

(*p*) *The Charkieh*, *ubi supra*; *The Julia Fisher*, *ubi supra*.

(*q*) *The Cameo*, Lush. 408.

(*r*) *The Newbattle*, 10 P. D. 33.

(*s*) See *The Amazon*, 36 L. J. Ad. 4.

(*t*) *The Never Despair*, 9 P. D. 34; *The Immacolata Concezione*, 8 P. D. 34. See also *The Cosmopolitan*, *ibid.* 35; *The Bjorn*, *ib.* 36, n.

(*u*) *Brunsden* v. *Humfrey*, 11 Q. B. D. 712; 14 Q. B. D. 141.

(*x*) *The Urania*, 10 W. R. 97; *The Alexandria*, L. R. 3 A. & E. 574; *Flower* v. *Bradley*, 44 L. J. Ex. 1.

(*y*) See Williams & Bruce, Ad. Pr. 2nd ed. 94, 95, note (*e*).

(*z*) *The Bowesfield*, 5 Asp. M. L. C. 265.

not, under Ord. XVI. r. 11, add parties so as to turn an action *in rem* into an action *in personam*; and it does not appear that the pilot has ever been added as a defendant except by consent. It appears, however, from the records of the Court, that in the last century the master was commonly sued together with the ship.

Action against Dublin Steam Packet Co.: notice.

By 6 & 7 Will. IV. c. 100 (local and personal), s. 8, it is provided that no action in any of His Majesty's Courts of Law shall be brought against the Dublin Steam Packet Company unless a month's notice in writing shall have been given to the company. It was held in *The Longford* (*a*), that this enactment did not apply to an action *in rem*.

Action at law supplemented by proceedings *in rem*, and *vice versâ*.

Where proceedings had been taken *in rem* in Admiralty and the amount realized by the sale of the ship was not sufficient to recompense the plaintiff, it was held, previously to the Judicature Acts, that he could bring his action at law for the residue of the loss (*b*). It would seem that he can now bring such supplemental action against the shipowner in person either in the Admiralty or in the Queen's Bench Division. *Vice versâ* an action may be brought *in rem* for damages which owing to the insolvency of the defendant, could not be recovered at law (*c*). But to an action *in rem*, proceedings *in personam* against the shipowner for the like purpose cannot be engrafted (*d*). Nor, if the ship has been released on bail which proves to be insufficient, can a subsequent action *in personam* be instituted in the Admiralty Division (*e*).

(*a*) 14 P. D. 34, following *The Mullingar*, 1 Asp. M. L. C. 252.

(*b*) *Nelson* v. *Couch*, 15 C. B. N. S. 99; *The Bold Buccleugh*, 7 Moo. P. C. C. 267; *The Orient*, L. R. 3 P. C. 696, 702; *The Pet*, 20 L. T. N. S. 961; *The Zephyr*, 11 L. T. N. S. 351. See also *The Sylph*, L. R. 2 A. & E. 24.

(*c*) *The John and Mary*, Sw. Ad. 471; *The Bengal*, *ib.* 468; *The Demetrius*, 41 L. J. Ad. 69; *The Sylph*, L. R. 2 A. & E. 24; *The Cella*, 13 P. D. 82.

(*d*) *The Hope*, 1 W. Rob. 154; *The Bowesfield*, 5 Asp. M. L. C. 265. In the last century the ship and her master were commonly sued together. See Assignation Books of the Admiralty Court.

(*e*) *The Kalamazoo*, 15 Jur. 885.

Re-arrest of ship to secure costs.

Where the shipowner appeared and defended the action, it was held that he could, by re-arrest of the ship, be compelled to pay costs (*f*), beyond the value of the ship and freight and the amount of his bail bond. Whether an excess of damages can be so recovered is doubtful (*g*).

Owners resident abroad; no service of writ.

Against owners resident abroad, where the collision occurs beyond British jurisdiction, and service of the writ cannot be effected within the jurisdiction, no personal action for damages can be entertained (*h*).

Action for loss of life, &c., none before Board of Trade inquiry.

Where a collision is accompanied by loss of life or personal injury, no action can be brought against the owner of a British ship in respect of such loss of life or personal injury (*i*) until the Board of Trade has either completed or refused to hold an inquiry under the provisions of the Merchant Shipping Act, 1854. Where no inquiry has been instituted within one month after service on the Board of Trade by the plaintiff of his desire to bring such action, the Board shall be deemed to have refused to hold an inquiry. It appears that this enactment does not apply to foreign ships (*k*).

Damages for loss of life, no action *in rem*.

No action can be brought *in rem* for loss of life under Lord Campbell's Act. The conflict of authority (*l*) which existed for many years upon this point has been lately set at rest by the decision of the House of Lords in *The Vera Cruz* (No. 2) (*m*).

(*f*) *The John Dunn*, 1 W. Rob. 159; *The Freedom*, L. R. 3 A. & E. 495.

(*g*) See *The Kalamazoo*, 15 Jur. 885; *The Zephyr*, 11 L. T. N. S. 351; *The Freedom*, L. R. 3 A. & E. 495.

(*h*) See above p. 211.

(*i*) This appears to be the meaning of 17 & 18 Vict. c. 104, s. 512, "no person shall be entitled to bring any action or institute any suit or other legal proceeding." But the words are wide enough to include actions for damage to property.

(*k*) See *The Vera Cruz* (No. 1), 9 P. D. 88.

(*l*) See *The Sylph*, L. R. 2 A. & E. 24; *The Guldfaxe*, *ib.* 325; *The Beta*, L. R. 2 P. C. 447; *The Borodino*, 5 L. T. N. S. 291; and *contra*, *Smith* v. *Brown*, L. R. 6 Q. B. 729; *Simpson* v. *Blues*, L. R. 7 C. P. 290. In *The Franconia*, 2 P. D. 163, the Court of Appeal was equally divided. See also *Taylor* v. *Dewar*, 5 B. & S. 58, and the observations of Sir R. Phillimore on that case, L. R. 2 A. & E. 329.

(*m*) 9 P. D. 96; 10 App. Cas. 59.

Third party procedure.

Where the defendant, in a collision action, claims to be entitled to recover from a third party the damages for which judgment may be given against him, attempts have been made to bring into the action such third party under Ord. XVI. rr. 48 *et seq.*, of the Rules of the Supreme Court. Thus, a ship in tow sued by a ship at anchor which she had fouled, sought to bring in the tug-owners as third parties, against whom they were entitled to indemnity (*n*). The judge refused to entertain the question of the liability of the tug-owners. The Rules in question apply only where the right to contribution or indemnity is founded upon contract, express or implied; they do not apply where the right of the defendant is to recover against a person, not a party to the principal action, damages to the same amount as the damages awarded in the action (*o*).

Arrest of wrong ship.

It has occurred in some cases that the plaintiff has failed to identify the ship sued with the ship with which his own has been in collision. So, where, in consequence of a collision between A. and B., a third ship, C., is injured, C. may be in a difficulty as to which ship to sue. It seems that if the wrong ship is arrested, she would, except in special circumstances, be entitled to costs, and, in flagrant cases, to damages and costs (*p*), or to her expense of procuring bail (*q*). In the absence, however, of malice and gross negligence on the part of the plaintiff, damages and even costs have not in all cases been given to the ship wrongly arrested (*r*).

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7 Ad. 398.

The law in Canada seems to be the same, see *Monaghan* v. *Horn*, *The Garland*, 7 Duval's Sup. Ct. Rep. Canada, 409; 40 Vict. c. 21 (Canada); 26 & 27 Vict. c. 10 (Vice Ad. Ct. Act), ss. 7, 13.

(*n*) *The Bianca*, 8 P. D. 91; see also *The Cartsburn*, 5 P. D. 35.

(*o*) *Speller* v. *Bristol Steam Navigation Co.*, 13 Q. B. D. 96; *Carshore* v. *North Eastern Rail. Co.*, 29 Ch. D. 344.

(*p*) *The Evangelismos*, Sw. 378; 12 Moo. P. C. C. 352; *The Active*, 5 L. T. N. S. 773; *The Strathnaver*, 1 App. Cas. 58; *The Cheshire Witch*, Br. & L. 362; *The Cathcart*, L. R. 1 A. & E. 314, 333; *The Volant*, Br. & L. 321; *The Glasgow*, Sw. 145; *The Victor Lush*, 72; *The Egerateia*, 38 L. J. Ad. 40.

(*q*) *The Collingrove*, 10 P. D. 158.

(*r*) *The Evangelismos*, Sw. 378; *The Strathnaver*, 1 App. Cas. 58.

Actions for limitation of liability.

By 14 & 15 Vict. c. 107, s. 514 (*s*), jurisdiction was given to the High Court of Chancery in England or Ireland, and to the Court of Session in Scotland, and in any British possession to any competent Court, in proceedings by a shipowner to limit his liability under the Act, to determine the amount of such liability, and to distribute the sum representing the amount of such liability amongst the several claimants; and further, to stay actions pending in respect of the collision. By 24 Vict. c. 10, s. 13, the same jurisdiction was conferred upon the Court of Admiralty, but only where the ship or the proceeds thereof are under arrest. Under the last-mentioned Act, it was held, that where the ship had sunk, and a sum of money had, after action brought, been paid into Court in lieu of bail, the Court of Admiralty had no jurisdiction to entertain the action for limitation of liability (*t*). By subsequent statutes, 23 & 24 Vict. c. 126, s. 35; 36 & 37 Vict. c. 66, ss. 16, 76; 30 & 31 Vict. c. 114, s. 36 (Ireland), the jurisdiction of the High Court of Chancery touching actions for limitation of liability has been vested in the High Court of Justice, and the Admiralty Division now entertains actions for limitation of liability, whether the ship or its proceeds are under arrest or not, its jurisdiction being co-extensive with that of the Court of Chancery, and not limited to that of the Court of Admiralty (*u*).

The benefit of the enactment limiting the shipowner's liability is ordinarily obtained by instituting an action in which the plaintiff claims a declaration by the Court to the effect that the plaintiff and his vessel are not answerable in damages to an amount exceeding, as the case may be, 8*l.* or 15*l.* per ton of the ship's tonnage. Upon payment into Court of the 8*l.* per ton and interest at 4*l.* per

(*s*) The previous enactment on the subject was 53 Geo. 3, c. 159, s. 7.

(*t*) *James* v. *London and S. W. Rail. Co.*, L. R. 7 Ex. 187; on app. *ibid.* 287. See also *The Northumbria*, L. R. 3 A. & E. 24.

(*u*) *The Foscolino*, 5 Asp. M. L. C. 420.

cent. from the date of the collision; and in case of loss of life or personal injury, upon payment into Court, or bail being given, for the additional amount up to 15*l.* per ton, or such smaller sum as the Court specifies; and upon payment into Court also of the costs of actions already instituted against the plaintiff in respect of the collision, the Court will make the declaration claimed, and thereupon all actions in respect of the collision for loss of life or injury to ship, cargo, or persons on board, will be stayed (*x*).

Limited liability may be claimed in defence.

The benefit of the statutory limitation of liability may also be claimed by way of defence or counterclaim in the collision action (*y*).

Costs of limitation action.

The plaintiff, in an action for limitation of liability, is required to pay the costs of the action, other than costs occasioned by disputes between rival claimants to the fund, and also the costs of actions stayed at his request (*z*). Where the defendant raises and fails upon special issues, he will have to bear the costs of such issues (*a*).

Evidence in limitation actions by affidavit.

The practice of the Admiralty Division in actions for limitation of liability, where no special defence is raised, is for the evidence to be taken by affidavit.

There was formerly doubt as to whether, in an action for limitation of liability, the plaintiff must admit that his vessel was in fault (*b*). By the present practice of the Admiralty Division it appears that such an admission is not necessary (*c*), though it is usual.

(*x*) For details of practice in these actions, see Williams & Bruce, Adm. Pr. 2nd ed. pp. 372–83.

(*y*) See *The Clutha*, 45 L. J. Ad. 108; *Wahlberg* v. *Young*, 45 L. J. C. P. 783. But see *James* v. *London & S. W. Ry. Co.*, L. R. 7 Ex. 187; *ib.* 287.

(*z*) *African Steamship Co.* v. *Swanzy*, 2 K. & J. 660; *The Empusa*, 5 P. D. 6.

(*a*) *The Empusa*, 5 P. D. 6; *The Warkworth*, 9 P. D. 20, 145.

(*b*) *The Amalia*, Br. & L. 151; *Hill* v. *Andus*, 1 K. & J. 263; *James* v. *London & S. W. Ry. Co.*, L. R. 7 Ex. 187; *ib.* 287. In *Hill* v. *Andus* the bill was not dismissed for want of jurisdiction, but the injunction to restrain a particular action was refused; see *per* Willes and Blackburn, JJ., L. R. 7 Ex. 291, 295.

(*c*) *The Sisters*, 1 P. D. 281; and see *The Amalia*, Br. & L. 151. The latter decision was, however,

Cargo-owner may in limitation action raise question whether one or both ships in fault.

An agreement between the shipowners that both ships, A. and B., were in fault for the collision does not prevent the owner of cargo on board one of them, B., from alleging, in an action by the owner of the other, A., to limit his liability, that A. was alone in fault; and he is entitled to an issue to decide that question (*d*).

Transfer of action from Queen's Bench to Admiralty Division, after judgment limiting liability.

Where the owners of a ship found alone to blame for a collision had obtained in the Admiralty Division a judgment limiting their liability, an action pending in the Queen's Bench Division for damages for personal injuries sustained in the collision was transferred to the Admiralty Division (*e*).

Proof against the fund: estoppel.

In an action (A) and counterclaim for a collision between *The Bellcairn* and *Britannia*, a judgment by consent was made dismissing action and counterclaim. Subsequently owners of cargo on board *The Britannia* brought their action (B) against *The Bellcairn*. In this action both ships were found to be in fault. *The Britannia* owners then instituted an action (C) for limitation of their liability, and obtained the usual judgment. Thereupon the owners of *The Bellcairn*, having, with the consent of *The Britannia* owners, induced the assistant registrar to rescind the judgment by consent in action (A), sought to claim for damage to *The Bellcairn* against the fund paid into Court in the limitation action (C) in competition with the cargo owners. It was held that the rescission of the judgment in action (A) was *ultra vires*, that *The Bellcairn* owners were estopped from bringing any further action against *The Britannia*, and that they could not claim against the fund in Court (*f*). But the case is different where the agreement entered into as to the first action (A) results in a discontinuance of that action. In such a case one of the parties is not estopped from asserting a claim

doubted in *The Karo*, 13 P. D. 24, at p. 29. See the report of the case in 6 Asp. M. C. at p. 247.

(*d*) *The Karo*, 13 P. D. 24.

(*e*) *Hawkins* v. *Morgan*, 49 L. J. Q. B. 618.

(*f*) *The Bellcairn*, 10 P. D. 161.

against a fund paid into Court in a limitation action by the other party (*g*).

Where cargo owners had recovered judgment against the other ship, and the owners of the carrying ship, after judgment in the cargo owners' action, brought their action against the other ship, and the damages in the two actions exceeded the statutory amount of the shipowners' liability, whilst the damages in the cargo owners' action did not exceed that amount, the Court refused to stay proceedings in the cargo owners' action until judgment was delivered in the shipowners' action (*h*). The object of the plaintiff in the second action was to share *pari passu* with the cargo owners in the fund to which the shipowners' liability was limited.

Successive actions by cargo owner and shipowner; no stay of proceedings.

There are contained in the Merchant Shipping Act, 1854 (*i*), elaborate provisions as to proceedings to be taken by the Board of Trade for the recovery of a limited amount of damages for loss of life and *personal injury* suffered in a collision. This enactment, which was intended for the protection of emigrants and the poorer class of passengers in crowded ships, is seldom made use of (*k*), as it has not been found to work satisfactorily (*l*).

Proceedings by Board of Trade for loss of life.

It is the practice in Admiralty to refer all questions as to the amount of damages to the registrar, assisted by merchants (*m*); but where the question is raised by the pleadings, it is in the discretion of the Court to decide at the hearing of the action whether a particular item of loss arising after the collision is recoverable as damages in the action.

Damages assessed by registrar and merchants; question of consequential damages may be decided at the hearing.

(*g*) *The Ardandhu, Owners of the Cargo of The Kronprinz* v. *Owners of the Kronprinz*, 11 P. D. 40; 12 App. Cas. 256.

(*h*) *The Alne Holme* (first action), 4 Asp. M. C. 593.

(*i*) 17 & 18 Vict. c. 104, ss. 507—513.

(*k*) It has been used once only, in the case of *The John*, shortly after the passing of the Act.

(*l*) As to the amount recoverable in these proceedings, see above p. 175.

(*m*) This is the practice in actions for damage to cargo under 24 Vict. c. 10, s. 6, as well as in damage actions: *The St. Cloud*, Br. & L. 4.

In exercising its discretion, the Court will be guided by the consideration whether the matter is one which involves questions of nautical skill, and can be dealt with better by the Court and its nautical assessors than by the registrar and merchants (*n*).

Lord Campbell's Act: assessment of damages by jury.

Where an action under Lord Campbell's Act for damages was instituted in the Admiralty Division, and no application for a transfer of the action to the Queen's Bench Division having been made, judgment was given for the plaintiffs upon default of pleading by the defendants, it was held, by Sir J. Hannen, that the plaintiffs were entitled to have the amount of the damages assessed by a jury in accordance with the terms of Lord Campbell's Act (*o*).

Surety in Admiralty bond may recover against co-owner.

Where a part owner, without the knowledge of his co-owner, executed a bond to obtain the release of his ship from arrest in a damage action, and subsequently became bankrupt, it was held that a surety who had been compelled to pay the amount of the bond could recover against the co-owner (*p*).

Master's liability on bond to prevent arrest of ship abroad.

The master of a vessel which, by the master's fault, had been in collision with another in a foreign port, in order to prevent her arrest, and in the interest of her owners, gave a bond in the names of himself and the shipowners to cover the damage to the other ship. In an action by the master against the ship for wages and disbursements, he claimed the amount of the penalty of the bond, and also the sum paid by him for repairs to his ship rendered necessary by the collision. It was held that he was not entitled, as against mortgagees of the ship, to have paid into Court the amount of the penalty of the bond so as to meet claims against him in respect thereof (*q*).

(*n*) *The Maid of Kent*, 6 P. D. 178.
(*o*) *The Orwell*, 13 P. D. 80.
(*p*) *Barker* v. *Highley*, 11 W. R. 968.
(*q*) *The Limerick*, 1 P. D. 411, reversing the Court below, *S. C.*, 1 P. D. 292.

Collisions abroad, and between foreign ships.

The jurisdiction of the Courts of this country in respect of collisions on the high seas, and in the territorial waters of foreign countries, and also where one or both the ships are foreign, is considered in a former chapter (*r*).

Admiralty jurisdiction of High Court of Justice.

The Admiralty jurisdiction of the High Court of Justice is co-extensive, geographically, with that of the late High Court of Admiralty; the jurisdiction of the latter Court having, by the Judicature Act, 1873, been transferred to the High Court of Justice (*s*). The jurisdiction of the Court of Admiralty extended to all collisions upon the high seas (*t*), and upon tidal waters not within the body of a county (*u*). By 3 & 4 Vict. c. 65, s. 6, its jurisdiction was extended to (amongst other things) claims for damage received by "any ship or sea-going vessel" within the body of a county; and by 24 Vict. c. 10, ss. 2, 7, it was further extended to claims for damage done by "any description of vessel used in navigation not propelled by oars." It appears that these statutes covered every case of collision between craft of all sorts, except a collision within the body of a county between lighters or other craft both of which are propelled by oars only. Thus, it was held that where the collision was within the body of a county, and the damage was done by a steamship to a barge, the case was covered by 24 Vict. c. 10, s. 7 (*x*); and where the collision was within the body of a county, and the damage was done by a barge to a steamship, the case was covered by 3 & 4 Vict. c. 65, s. 6 (*y*). But where the collision was within the body of a county, and the damage was done by one Thames lighter (propelled by oars only) to another similar craft, the Admiralty Court had no jurisdiction (*z*). Consequently, in the last-mentioned case, though the Admiralty Division has jurisdiction as a Division of the High Court

(*r*) *Supra*, p. 208 *seq.*
(*s*) 36 & 37 Vict. c. 66, s. 16.
(*t*) *The Sarah*, Lush. 549.
(*u*) 13 Ric. 2, st. 1, c. 5; 15 Ric. 2, c. 3.
(*x*) *The Malvina*, Lush. 493; Br. & Lush. 57. This case was not within 3 & 4 Vict. c. 65, s. 6; *The Bilbao*, Lush. 149.
(*y*) *Purkis* v. *Flower*, L. R. 9 Q. B. 114.
(*z*) *Everard* v. *Kendall*, L. R. 5 C. P. 428. But see on this case *The Rona*, 7 P. D. 247.

of Justice, there is no damage lien. The Acts above mentioned gave the Admiralty Court jurisdiction in the case of damage by any craft not propelled by oars to property ashore (*a*), and also to any sort of craft or other property afloat (*b*).

The High Court of Admiralty had inherent jurisdiction over every sort of collision and damage to property occurring on the high seas (*c*), and this jurisdiction is now possessed by the High Court of Justice.

The Acts above mentioned, which alternately restricted and enlarged the jurisdiction of the Court of Admiralty, are now of importance only in connection with questions of maritime lien, and questions touching the jurisdiction of County Courts.

Jurisdiction of County Courts in case of collision.

By the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 3, sub-s. 3, and an Act amending it (32 & 33 Vict. c. 51), s. 4 (*d*), certain County Courts therein referred to have Admiralty jurisdiction in actions for collision occurring within the limits of their local jurisdiction, where the amount claimed does not exceed 300*l.*; also in actions for damage to ships, whether by collision or otherwise, up to the same amount (*e*). Where the collision was in the body of a county between two Thames lighters (propelled by oars only), it was held that the County Court had no jurisdiction (*f*); nor where

(*a*) See above, p. 81.

(*b*) For the meaning of "ship" in s. 458 of 17 & 18 Vict. c. 104, see *The Mac*, 7 P. D. 38; on app. *ib.* p. 126; and elsewhere in the same Act, *The C. S. Butler*, L. R. 4 A. & E. 238; *Ex parte Ferguson*, L. R. 6 Q. B. 280; of "vessel" in 10 & 11 Vict. c. 27, s. 3, see *Hedges* v. *London and St. Katherine's Docks Co.*, 16 Q. B. D. 597.

(*c*) *The Sarah*, Lush. 549.

(*d*) As to County Court Admiralty jurisdiction and practice, see Williams & Bruce, Ad. Pr. 2nd ed. p. 227 *seq.*

(*e*) These sections have been held to give jurisdiction in a case of damage to the warp of a trawler, which was cut by the warp of another trawler: *The Warwick*, 15 P. D. 189. In this case both trawlers were insured in a collision club, upon the terms *inter alia* that "in the event of a collision between two vessels insured" in the club, "or their respective . . . gear . . . the directors should have power to arbitrate on the matter, and their decision should be final." The defendant denied that his vessel or gear had been in collision, and it was held that the directors had no power to determine this question, and consequently that their award was not binding. See also *The Swan*, 89 L. T. 138

(*f*) *Everard* v. *Kendall*, L. R. 5

the damage was to property ashore by a ship afloat (*g*); but damage to a barge by a steamship (*h*), and damage by a barge to a steamship (*i*), is within the jurisdiction; and it matters not whether the collision occurs on tidal water or in a dock or channels leading thereto (*k*). The construction placed upon the Acts by the Courts limits the jurisdiction, in the case of damage to craft propelled by oars only within the body of a county, to damage caused by collision with a craft propelled otherwise than by oars.

By the above-mentioned Acts, the legislature appears to have conferred upon the County Courts a jurisdiction in respect of collision which is the same (but limited as to locality and amount) as that which the Court of Admiralty possessed at the date of the passing of 31 & 32 Vict. c. 71.

City of London Court: service of warrant of arrest.

Service of the writ of summons by a clerk in the high bailiff's office was held not to be good service in the case of a warrant of arrest addressed by the City of London Court to the high bailiff, and others the bailiffs thereof (*l*).

A County Court has jurisdiction to entertain an action for breach of the towage contract (*m*).

A right of appeal from the County Court is conferred under certain circumstances by 31 & 32 Vict. c. 71, s. 26, and following sections (*n*).

C. P. 428. But see as to this case, *The Rona*, 7 P. D. 247.

(*g*) *E. g.*, a pile-driving machine: *Robson* v. *The Owner of the Kate*, 21 Q. B. D. 13.

(*h*) *The Malvina*, Lush. 493; Br. & L. 57; *The Cynthia*, 2 P. D. 52.

(*i*) *Purkis* v. *Flower*, L. R. 9 Q. B. 114.

(*k*) *Reg.* v. *Judge of City of London Court*, 8 Q. B. D. 609.

(*l*) *The Palomares*, 10 P. D. 36; see 31 & 32 Vict. c. 71, s. 23.

(*m*) *The Isca*, 12 P. D. 34.

(*n*) See *The Humber*, 9 P. D. 12. Notwithstanding 51 & 52 Vict. c. 43, s. 120 (County Courts Act, 1888), no appeal lies from an interlocutory order of the County Court in an Admiralty action, except by leave of the judge; *The Cashmere*, 15 P. D. 121. A mere misapprehension as to the effect of enactments is not "sufficient cause" for allowing an appeal to be prosecuted which is not brought within the time prescribed by 31 & 32 Vict. c. 71, s. 27. There must be some special circumstance in addition; *The Irwin*, 90 L. T. 172. Absence from England of the party desiring to appeal may be such a special circumstance. *The Humber*, 9 P. D. 18. In *The Irwin*, a question was raised whether the application for extension of time could be entertained by a single judge, and a divisional Court was formed for the purpose of hearing it. *Sed quære*, whether this course was necessary. See O. LIX. r. 4.

CHAPTER XIII.

COSTS.

General rule: costs follow event.

THE general rule as to costs in a collision action, in which the owners of the two ships are plaintiff and defendant, is that costs follow the event of the action. If the collision is found to have been caused by the fault of the defendant ship alone, the plaintiff is entitled to the costs of the action; if his ship was alone in fault, or he fails to prove fault in the defendant ship, he will be condemned in costs. But the rule is not invariable. The Court has a discretion (*a*); and in a recent case an unsuccessful plaintiff was not condemned in costs, although the only special circumstance was the difficulty of proof, owing to the collision having occurred in a dense fog (*b*).

Both ships in fault.

Where both ships are in fault, the rule is that each party, whether the plaintiff sues as shipowner, cargo owner, or otherwise (*c*), bears his own costs (*d*). This rules applies whether there is or is not a counterclaim (*e*); also where the fault of one of the ships is the fault of her

(*a*) Ord. XLV. r. 1; as to the limit of this discretion, see *Re Mill's Estate*, 34 Ch. D. 24.

(*b*) *The Sardinian*, Ad. Div. 9th Dec. 1886.

(*c*) *The City of Manchester*, 5 P. D. 221; *The Vera Cruz*, 9 P. D. 88.

(*d*) *The Washington*, 6 Jur. 1067; *The Telegraph*, 1 Sp. E. & A. 427; *Wilson* v. *Canada Shipping Co.*, *The Lake St. Clair*, and *The Underwriter*, 2 App. Cas. 389; *The Agra* and *The Elizabeth Jenkins*, L. R. 1 P. C. 501; *The Lovebird*, 6 P. D. 80. The rule formerly was that the costs of the action were divided, and one half borne by each party. The present practice is said to have been introduced by Lord Stowell (*per* Lord Blackburn, 7 App. Cas. 818; *sed vide* 1 W. Rob. 21), in order to avoid the cost of apportionment (*per* James, L. J., *The City of Manchester*, 5 P. D. 221), or as part of the discipline of the seas, so that neither of two wrong-doing ships should gain anything by the litigation. (*Per* Brett, L. J., *The Hector*, 8 P. D. 218, *sed qu.*)

(*e*) *The Rigborgs Minde*, 8 P. D. 132.

compulsory pilot (*f*). Where a defendant, before statement of claim delivered, admitted that his vessel was in fault, and pleaded the admission in his statement of defence, and the Court found that both ships were in fault, the plaintiff was ordered to pay the costs incurred after the defendant's admission (*g*). And so, where the plaintiffs, in their statement of claim, admitted that they were to blame, but alleged that the defendants were also to blame, which the Court found to be the fact, the plaintiffs were held entitled to costs (*h*).

Inevitable accident.

It was formerly a rule (*i*) of the Admiralty Court that, where the collision occurred without fault in either ship—the so-called case of inevitable accident—provided the plaintiff was not unduly rash in bringing his action (*k*), no costs were given on either side. In a case decided by Sir R. Phillimore since the Judicature Acts, where the collision was held to have occurred without fault in the defendant, no order was made as to costs. One ground of the decision was that the defendant ship had unavoidably a riding light exhibited, though she was not at anchor (*l*). The Court of Appeal, however, has since held that there should be an uniform practice as to costs in all the Divisions of the High Court, and that, in the absence of special circumstances, costs will in future follow the event of the action in cases of collision by "inevitable accident," as in other cases (*m*).

Where the plaintiffs, in their reply, admitted that the collision was an inevitable accident, the defendants, upon motion for judgment, obtained judgment with costs (*n*).

(*f*) *The Rigborgs Minde*, 8 P. D. 132; *The Hector*, 8 P. D. 218.

(*g*) *The Ebor*, 11 P. D. 25; cited on this point Williams & Bruce, Ad. Pr. 2nd ed. p. 88.

(*h*) *The General Gordon*, 63 L. T. N. S. 117; reversed on the facts, Feb. 18th, 1891.

(*i*) *The Itinerant*, 2 W. Rob. 236; *The London*, Br. & L. 82, followed by the Privy Council in *The Marpesia*, L. R. 4 P. C. 212.

(*k*) For an instance, see *The Thornley*, 7 Jur. 659.

(*l*) *The Buckhurst*, 6 P. D. 152.

(*m*) *The Monkseaton*, 14 P. D. 51, followed in *The Batavier*, 15 P. D. 37.

(*n*) *The Naples*, 11 P. D. 124.

Arrest of wrong ship.

Where the plaintiff failed to identify the ship arrested as the ship with which his own had been in collision, the action was dismissed with costs (*o*). It seems that, to entitle the defendant in such a case to damages for the wrongful arrest of his ship, gross negligence, equivalent to malice, must be proved against the plaintiff (*p*).

The decisions in Admiralty in which a successful defendant has been required to bear his own costs, so far as they conflict with the practice of the other Divisions of the High Court, would probably not now be followed (*q*).

Costs refused: violence of crew.

The ship that succeeded in the collision action was in one case deprived of her right to costs by reason of the violence of her crew to those on board the other ship at the time of the collision (*r*); and in another case (before the statutory rule as to standing by was in force), a vessel was deprived of her costs by reason of her failure to stand by and assist the other ship (*s*).

Cargo-owner claiming defendant's ship to be alone in fault where both are in fault.

The owner of cargo who sues the ship with which the carrying ship has been in collision will not get his costs if he claims that the ship sued is alone in fault, and it is held that both ships are in fault (*t*). It has been said that the strict course in such a case is to give the plaintiffs the costs of the issue upon which they succeed, and to make them pay the costs of the issue on which they fail. But, to avoid the expense of such an apportionment, it was held in *The City of Manchester* that no order should be made as to costs (*u*).

(*o*) *The Evangelismos*, Sw. 378; 12 Moo. P. C. C. 352; *The Active*, 5 L. T. N. S. 773; *The Strathnaver*, 1 App. Cas. 58; see also *The Peri*, 32 L. J. Ad. 46.

(*p*) See cases cited in last note, and p. 319, *ante*.

(*q*) *The General Steam Navigation Co.* v. *London & Edinburgh Shipping Co.*, 2 Ex. D. 467; *The Monkseaton*, 14 P. D. 51; and see *per* Butt, J., *The Naples*, 11 P. D. 124; *The Batavier*, 15 P. D. 37.

(*r*) *The Catalina*, 1 Sp. 23.

(*s*) *The Celt*, 3 Hag. Ad. 321.

(*t*) *The City of Manchester*, 5 P. D. 221, reversing the decision of the Court below; *The Hibernia*, 2 Asp. Mar. Law Cas. 454. *The Milan*, Lush. 388, would not, it seems, now be followed on this point.

(*u*) See *per* James, L.J., 5 P. D. at p. 223. Baggallay, L.J., in the same case thought that neither party should get any costs.

In an action by the owners of a barge against her tug and a steamship with which she had been in collision, the owners of the steamship having attempted to cast the whole blame on the tug, their vessel was found alone to blame, and they were ordered to pay the costs, both of their co-defendants and of the plaintiffs (*x*).

Costs in case of collision with one of Her Majesty's ships.

In the case of a collision with a Queen's ship, the Crown usually conforms to the practice of the Court as to payment of costs (*y*), but no order for payment can be made against the Crown (*z*).

Defence of compulsory pilotage.

A defendant who, admitting that his ship was in fault for the collision, raises and succeeds upon the defence of compulsory pilotage, will obtain his costs (*a*); and costs were given to a defendant who in his pleadings alleged that his ship was not in fault, but at the trial abandoned this defence and relied solely upon his alternative plea of compulsory pilotage (*b*); but where, defending the case upon the merits, he fails, though he raises also, and succeeds upon, the defence of compulsory pilotage, he will neither get, nor will be ordered to pay, costs. Each party, in such a case, is left to bear his own costs of the action (*c*); but if the defendant, in addition to defending the case on its merits, has set up a counterclaim, it will be dismissed with costs (*d*). So, before the Judicature Acts, where there were cross actions, and the collision was held to have been caused by the compulsory pilot of the plaintiff's ship, the plaintiff's action was dismissed with costs, and the defendant's cross action without costs (*e*).

(*x*) *The River Lagan*, 6 Asp. M. C. 281.
(*y*) *H.M.S. Swallow*, Swab. 30.
(*z*) *The Leda*, Br. & Lush. 19.
(*a*) *The Royal Charter*, L. R. 2 A. & E. 362; *The Schwann*, L. R. 4 A. & E. 187; *The Juno*, 1 P. D. 135; *The Winston*, 8 P. D. 176.
(*b*) *The Oakfield*, 11 P. D. 34.
(*c*) *The Schwann*, L. R. 4 A. & E. 187; *The Beta*, Br. & L. 328.
(*d*) So held, after reserving the point for inquiry, in *The Ruby*, 15 P. D. 139. In *The Princeton*, 3 P. D. 90; and *The Mercurius*, Ad. Div. June, 1887, no costs were given, either of action or counterclaim; but the point does not appear to have been argued, at least in the former case.
(*e*) *The Annapolis*, Lush. 295, 313.

The above was formerly the practice in the Admiralty Court and Privy Council (*f*); it has been followed since the Judicature Acts by the Court of Appeal and the Admiralty Division (*g*). But in the Exchequer Division this practice was on one occasion not followed, and the plaintiff was ordered to pay the defendant's costs (*h*). In *The Hankow* (*i*) the uncertainty of the law as to compulsory pilotage was assigned as a reason for not giving costs. Where, upon the defendant delivering his defence alleging that the collision was caused by the fault of the compulsory pilot in charge of his ship, the plaintiff discontinued his action, Butt, J., held that the plaintiff must pay the defendant's costs, upon the ground that there were no facts before him upon which he could exercise a discretion (*k*).

The rule as to no costs being given where both ships are in fault applies where the fault is that of a compulsory pilot (*l*).

Costs of reference to registrar.

The costs of a reference as to damages do not follow the costs of the action (*m*). The investigation before the registrar is in the nature of a new litigation, and the costs of it are in the discretion of the judge (*n*). The general rule, before the Judicature Acts, was that the claimant is entitled to his costs of establishing his claim before the registrar, provided not more than one-fourth of the claim is disallowed (*o*). And this appears still to be the prac-

(*f*) *The Inniafail*, 3 Asp. Mar. Law Cas. 337; 35 L. T. N. S. 819; *The Princeton*, 3 P. D. 90.

(*g*) *The Matthew Cay*, L. R. 5 P. D. 49; *The Daioz*, 3 Asp. Mar. Law Cas. 477; *The Rigborgs Minde*, 8 P. D. 132; *The Altyre*, Ad. Div. 27th Feb. 1885, where there was a counterclaim.

(*h*) *General Steam Navigation Co.* v. *London and Edinburgh Shipping Co.*, 2 Ex. D. 467.

(*i*) 4 P. D. 197.

(*k*) *The J. H. Henkes*, 12 P. D. 106. Butt, J., expressed an opinion that the practice as to costs should be uniform in all Divisions of the High Court.

(*l*) *The Rigborgs Minde*, 8 P. D. 132; *The Oakfield*, 11 P. D. 34.

(*m*) Formerly a different practice prevailed: see *The Peerless*, 6 L. T. N. S. 107.

(*n*) *The Consett*, 5 P. D. 52, 77; followed in *The Savernake*, 5 P. D. 166; *The Mary*, 48 L. T. N. S. 28; 7 P. D. 201.

(*o*) *The Amelia*, 23 L. T. N. S. 544; *The Empress Eugénie*, Lush. 138.

tice (*p*). If more than one-fourth and less than one-third of the claim is disallowed, no order is made as to costs (*q*). If more than one-third of the claim is disallowed, the claimant will be ordered to pay the costs of the reference (*r*); and this rule will not be relaxed merely because the claimant fails to prove the required amount of his claim upon a point of law (*s*). The rule is the same whether one or both ships are in fault (*t*); whether the claim is by an owner of ship or of cargo (*u*); whether the claimant is plaintiff or defendant claiming upon a counterclaim (*x*); and whether, both ships being in fault, proceedings upon the reference have been taken with respect to the damage to one or both ships (*y*).

Under special circumstances, the general rules above stated have been departed from. Thus, in a case where nearly half the claim was disallowed, the costs of proving certain items were allowed, and no order made as to the residue of the costs (*z*). So a claimant has obtained his costs where more than three-fifths of his claim was disallowed, because of the difficulty of determining how much of the damage was due to the collision (*a*). Where the claim was for loss of a fishing voyage, and for loss of gear, and the sum claimed for gear was paid into Court, the claimant obtained part of his costs of proving the rest of his claim, though more than one-third was struck off (*b*).

(*p*) In *The Savernake*, 5 P. D. 166, about one-ninth; in *The Mary*, 7 P. D. 201, less than one-fifth was disallowed. The claimants got their costs of the reference in both cases.

(*q*) *The Amelia, ubi supra; The Williamina*, 3 P. D. 97; *The Empress Eugènie, ubi supra.*

(*r*) *The Empress Eugènie*, Lush. 138; *The Naomi*, 32 L. T. N. S. 836; *The Englishman*, 38 L. T. N. S. 766; *The Gleaner*, 38 L. T. N. S. 650.

(*s*) *The Empress Eugènie, ubi supra; The Consett*, 5 P. D. 229 (the shipowner's claim).

(*t*) In *The Consett*, *The Savernake* and *The Mary*, both were in fault.

(*u*) In *The Consett*, 5 P. D. 52, 77, the claim was by cargo-owner.

(*x*) In *The Mary* both plaintiff and defendant got their costs.

(*y*) In *The Savernake* it did not appear that before the reference any proceedings had been taken by one of the ships.

(*z*) *The Consett*, 5 P. D. 229.

(*a*) *The Elina*, 5 P. D. 237, note.

(*b*) *The Gleaner*, 38 L. T. N. S. 650; and see *The Parana*, 1 P. D. 452, 461; 2 P. D. 118.

Where a claimant, after withdrawing at the reference a large part of his claim which he had persisted in up to the reference, succeeded in proving two-thirds of his claim as diminished, though less than two-thirds of his original claim, it was held that he must pay the costs of the reference (*e*).

The rule that each party pays his own costs of the reference, where more than one-fourth and less than one-third has been struck off the claim at the reference, does not apply where the registrar's report has been appealed from and overruled, though by the ultimate decision of the Court the above-mentioned part of the claim is allowed (*f*).

In *The Friedeberg* the Court of Appeal, apparently under the impression that the practice in Admiralty as to allowing and disallowing costs of a reference was a hard and fast rule, said that it was contrary to Ord. LXV., r. 1, and threw doubt upon the justice and validity of the practice. The attention of the Court does not appear to have been called to the cases above cited, which show that there is not, and never was, a hard and fast rule which would fetter a judge's discretion in each case (*g*). Notwithstanding the remarks of the Court of Appeal (which were *obiter*), the established practice as to allowing or disallowing costs of a reference according as a definite part of the claim is established or not, will probably be maintained.

Report of registrar as to costs.

The registrar is empowered to report whether any and what part of the costs should be allowed, and to whom (*h*). His report is seldom disturbed (*i*). Where there is no report, an order as to the costs will be made upon motion by the Court (*j*).

(*e*) *The Eilean Dubh*, 49 L. T. N. S. 444.
(*f*) *The Black Prince*, *infra*.
(*g*) 10 P. D. 112.
(*h*) Ord. LVI., r. 8; see *The Eilean Dubh*, 49 L. T. N. S. 444.
(*i*) *The Consett*, 5 P. D. 77; *The Savernake*, 5 P. D. 166.
(*j*) *The Mary*, 7 P. D. 201.

Costs of appeal from registrar.

The costs of an appeal from the registrar, as a general rule, follow the result of the appeal (*k*).

Costs in Court of Appeal.

Where the decision of the Court below is reversed or varied, and the Court of Appeal holds the collision to have been caused by the fault of both ships, no order will be made as to costs, either of the Court below or of the appeal; each party being left to bear his own costs (*l*). Thus, where in the Admiralty Division it had been held that the collision was caused entirely by the fault of one ship, and the Court of Appeal found that it had been caused by fault in both ships, no costs were given in either Court. "The Admiralty Court, which always exercised a very wide jurisdiction with regard to the discipline of the seas, laid down this rule: If both vessels are to blame neither of them shall gain by any litigation in the matter. The Privy Council, I think, adopted that view of the matter, and carried out the rule on appeal, save under exceptional circumstances. These exceptional circumstances are where the judgment of the Court below has been that both vessels were to blame, and that judgment is affirmed" (*m*).

In *The Ann* (*n*) the Privy Council dismissed the appeal, but without costs, because, although the appellant's ship had been found solely in fault in the Court below, whereas in the opinion of the Privy Council she was free from blame, the appellant had in his pleadings alleged that the collision was caused by his adversary's ship starboarding, the fact being that she had caused the collision by not porting in time.

It appears to be now settled (*o*) that where the Court of Appeal, reversing the decision of the Court below, finds

(*k*) *The Black Prince*, Lush. 568; *The Parana*, 1 P. D. 452; 2 P. D. 118.

(*l*) *The Hector*, 8 P. D. 218; *The Bjorgve Minde*, 8 P. D. 132; *The Arratoon Apcar*, 15 App. Cas. 37.

(*m*) *Per* Brett, M.R., *The Hector*, 8 P. D. 218.

(*n*) Lush. 55.

(*o*) Notwithstanding *The Swansea* and *The Condor*, 4 P. D. 115, and *The Milanese*, 4 Asp. M. L. C. 318.

the collision to have occurred without fault in either ship, the sued is entitled to her costs both of the appeal and in the Court below. It has been so held where there was no counterclaim alleging negligence in the plaintiff's ship (*p*).

Where in the Admiralty Court one ship was held in fault, and upon appeal to the Privy Council both ships were held in fault, the order of the Privy Council was that each party should bear his costs both of the appeal and in the Court below (*q*).

The Court of Appeal does not always follow the practice of the Privy Council as to costs (*r*).

The rule, that no costs of the appeal or in the Court below will be given where both ships are in fault, applies where the fault of one of the ships is the fault of her compulsory pilot (*s*).

Where both ships are held in fault in the Court below, and upon the appeal by one of the parties the other party applies to have the judgment varied or reversed, and the Court of Appeal affirms the decision of the Court below, the appellant will be ordered to pay the costs of the appeal, except so far as they have been augmented by the notice given by the respondent (*t*).

Where in the Court below both ships are held in fault, and one only of them appeals, and the appeal is dismissed, the appellant will be ordered to pay the costs of the appeal (*u*).

Where, upon a claim and counter-claim, ship A. is held solely in fault, and upon appeal the decision is reversed,

(*p*) *The Monkseaton*, 14 P. D. 51; see also *The Marpesia*, L. R. 4 P. C. 212; *The City of Cambridge*, 3 Asp. M. L. C. 307; *The Corinna*, *ibid.*

(*q*) *The Agra*, and *The Elizabeth Jenkins*, L. R. 1 P. C. 501.

(*r*) *The City of Berlin*, 2 P. D. 187; *The Monkseaton*, 14 P. D. 51.

(*s*) *The Rigborgs Minde*, 8 P. D. 132.

(*t*) *The Lauretta*, 4 P. D. 25.

(*u*) *The Milanese*, 4 Asp. Mar. Law Cas. 438; and see *per* Brett, L. J., in *The Hector*, 8 P. D. 218.

and ship B. held solely in fault, the appellant will get his costs both of the appeal and in the Court below (*x*).

Security for costs.

A plaintiff, or a defendant having a counter-claim, who is resident out of the jurisdiction elsewhere than in Scotland or Ireland (*y*), may be required to give security for costs (*z*); but he will not be required to give security for damages that may be awarded against him (*a*).

Costs of action for limitation of liability.

The general rule as to the costs of an action for limitation of liability is that they shall be borne by the plaintiff. But if the defendant raises issues which are decided against him, as where he disputes the right of the plaintiff on the ground that the loss was by and with the actual fault and privity of the owners (*b*), or was not caused by improper navigation (*c*), or that there is a separate liability in respect of each of two collisions (*d*), he will be compelled to pay the extra costs occasioned to the plaintiff by such issues. Nor will the plaintiff in the limitation action have to pay the costs of litigation between the claimants upon the fund representing the amount of their statutory liability as to their respective rights to share in the fund (*e*).

Costs of action for amount below County Court limit.

Costs are now in all cases in the discretion (*f*) of the Court (*g*). The provisions of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), ss. 3, 9, as to costs, are no longer in force, and a plaintiff who

(*x*) *The Glannibanta*, 1 P. D. 283 (1876). See further, as to costs on appeal, *The Saxonia*, and *The Eclipse*, Lush. 410; *The Telegraph*, 1 Sp. E. & A. 427; *The Florence Nightingale*, Br. & L. 29; *The Ulster*, 1 Moo. P. C. C. N. S. 31; *The Dumfries*, Sw. 125; *The North American*, Sw. 358.

(*y*) See 31 & 32 Vict. c. 56; 36 & 37 Vict. c. 66, s. 76; *The Pelaw*, cited Williams and Bruce, Ad. Pr. 2nd ed. 482, note (*x*).

(*z*) *The Constantine*, 4 P. D. 156; *The Newbattle*, 10 P. D. 33; *The Julia Fisher*, 2 P. D. 115.

(*a*) *The Mary*, or *Alexandra*, L. R. 1 A. & E. 335.

(*b*) *African Steamship Co.* v. *Swanzy*, 2 K. & J. 660; *The City of Buenos Ayres*, 1 Asp. Mar. Law Cas. 169; *The Empusa*, 5 P. D. 6.

(*c*) *The Warkworth*, 9 P. D. 20.

(*d*) *The Creadon*, 5 Asp. M. C. 585.

(*e*) *African Steamship Co.* v. *Swanzy*, *ubi supra*; *The City of Buenos Ayres*, *ubi supra*; *The Empusa*, *ubi supra*.

(*f*) For the limits of this discretion, see *Re Mills' Estate*, 34 Ch. D. 24.

(*g*) Rules of Sup. Court, 1883, Ord. LXV. r. 1.

brings his action in the Supreme Court may receive his costs, though the amount of his damages are less than the County Court limit (*h*); but in practice, he will not get them unless there are special circumstances justifying his proceeding in the High Court (*i*).

Costs of appeal from County Court.

Upon appeal from a County Court, 31 & 32 Vict. c. 71, s. 30, provides that an unsuccessful appellant shall pay the costs of the appeal, unless the Appellate Court otherwise directs. This enactment, if not repealed, is subject to the discretion vested in Divisional Courts by Ord. XLV. r. 1.

Costs of excessive bail.

If a plaintiff arrests the defendant ship, and requires bail for an exorbitant sum, he will be ordered to pay all the costs and expenses to which the defendants have been put in finding bail. Such an order was made in a salvage action, where 3,000*l.* was claimed, and bail for that sum required, and only 450*l.* was awarded (*k*).

Costs upon higher scale.

As to the principles upon which costs upon the higher scale will be awarded, see Ord. LXV. rr. 9, 10 (*l*).

Costs of paying freight into Court.

The owner of cargo arrested for freight, upon paying into Court the amount of freight, may deduct the cost of paying it in (*m*).

Costs: expense of sureties.

Money paid to sureties on a bail bond in consideration of their suretyship will not be allowed as costs (*n*).

Costs: expense of retaining seamen witnesses.

The expense of retaining seamen witnesses until the trial is allowed as costs (*o*).

(*h*) *Garnett* v. *Bradley*, L. R. 3 App. Cas. 944; *Tennant & Co.* v. *Ellis & Co.*, 6 Q. B. D. 46; *The Camellia*, 9 P. D. 27; *Snelling* v. *Pulling*, 29 Ch. D. 85; *Parnell* v. *Mort, Liddell & Co.*, *ib.* 326.

(*i*) *The Herald*, 63 L. T. N. S. 324; *The Asia*, [1891] P. 121.

(*k*) *The George Gordon*, 9 P. D. 46; and see *The Earl Grey*, 1 Sp. 180; *The Eléonore*, Br. & L. 185. As to moderation of bail, see *supra*, p. 87.

(*l*) See also *The Horace*, 9 P. D. 87; *The Raisby*, 5 Asp. M. C. 473 (both salvage cases). As to an appeal upon the question of higher or lower scale, see *Re Terrell*, 22 Ch. D. 473. As to the scale of counsel's fees, see *The City of Lucknow*, 5 Asp. M. C. 340.

(*m*) *The Leo*, Lush. 414; see Ord. XXIX. r. 4.

(*n*) *The Collingrove*, 10 P. D. 158; *The Numida*, *ibid.*

(*o*) *The Karla*, Br. & L. 367.

CHAPTER XIV.

THE REGULATIONS FOR PREVENTING COLLISIONS AT SEA.

Legislation as to the rule of the road.

MANY years before the rule of the road at sea was regulated by Act of Parliament, the practice of seamen had established rules to enable approaching ships to keep clear of each other. These rules, which are the foundation of those now in force, were well established by custom, and formed part of the general maritime law administered by the Admiralty Court (*a*). In the year 1840 a rule (*b*) as

(*a*) A rule of the road for ships on opposite tacks existed at least as early as the latter part of the last century. In Admiralty Regulations of that date, to be observed by ships under convoy, there appears a rule to the effect that a ship on the larboard tack shall bear up for another on the starboard tack. But it is doubtful whether this rule existed a century earlier. In the Duke of York's Sailing and Fighting Instructions, attributed to the year 1670, but probably of a later date, occurs the following article:—"Where two ships of the same rank are sailing on the same tack, or on contrary tacks, and there is a necessity for one of them to bear up to the other, he that can with the most convenience bear up is to do it; but if it be equally convenient to both of them, then the younger captain shall bear up for the elder." If the rule as to the ship on the port tack giving way had been generally recognized when this regulation was framed, it would probably have been mentioned.

In several collision cases decided by the Admiralty Court during the 17th and 18th centuries, the writer has found no trace of the rule in the pleadings, decrees, or sentences.

See Marsden's Admiralty Cases, p. 333, as to the origin of the port tack rule. In *The Resolution* (*ibid.* p. 332) (1789), the rule is said to have been framed by Lord Howe seven or eight years previously.

The rule that a ship with the wind free must give way to a ship close hauled appears to have been first recognized by the Courts in Lord Erskine's time, "in a case tried at Guildhall before Mr. Justice Buller." See a letter addressed by Lord Erskine (an old sailor) to Lord Stowell, dated 7th Dec. 1821, respecting Lord Stowell's judgment

(*b*) This rule—to the effect that steamships shall pass on the starboard hand of each other—will be found 1 W. Rob. 488. As to its construction, see *The Friends*, 1 W. Rob. 484; 4 Moo. P. C. C. 314; *The Unity*, Sw. 101; *The Duke of Sussex*, 1 W. Rob. 274; *The Hope*, *ib.* 154; *The Immaganda Sara Clunina*, 8 Moo. P. C. C. 85.

to the side on which steamships were to pass each other was promulgated by the London Trinity House, and enforced by the Admiralty Court. In 1846 the subject was first dealt with by the Legislature (*c*), and since that year the law has been altered or added to by three successive Acts of Parliament (*d*). The only Act now in force is 25 & 26 Vict. c. 63.

Enactment of the existing Regulations.

By that Act (s. 25), power is given to her Majesty, upon the joint recommendation of the Admiralty and the Board of Trade, by Order in Council, to make Regulations for Preventing Collisions.

By s. 58, such Regulations are to apply to British ships everywhere, and to foreign ships when within British jurisdiction. By s. 59, the Queen is enabled with the consent of the foreign government by Order in Council to apply the Regulations to foreign ships when not within British jurisdiction. Under these powers, the Regulations of 1884 have been made and applied to the ships of Great Britain, France, Greece, Portugal, Italy, Sweden, Norway, Brazil, Turkey, Chili, and Denmark (*e*).

in *The Dundee*, reported in the "Times" of 6th Dec. 1821. The letter will be found in The Life of Lloyd, first Lord Kenyon, by the Hon. G. T. Kenyon, Longmans, 1873.

In the year 1828, the rule of the road at sea was thus stated in evidence by a competent witness:— "If a vessel is going close-hauled to the wind, and another meeting her is going free, the rule at sea is for the vessel meeting her to go to leeward; and the reason of it is that otherwise the vessel going to windward would lose her position, and could not get in again without another tack, which would be an inconvenience to her, and not to the vessel going free." By the Court, the rule was thus stated:— "The ship which has the wind at large may go either to leeward or to windward; but, as a general rule, she ought to expect that the ship which is close-hauled will keep to windward, and therefore she ought to go to leeward, unless it is quite clear that she can go to windward with safety." See *Haydayside* v. *Wilson*, 3 C. & P. 528.

(*c*) 9 & 10 Vict. c. 100.

(*d*) 14 & 15 Vict. c. 79; 17 & 18 Vict. c. 104; Admiralty Order of 26th Oct. 1858, see Appendix, Swabey's Rep.; 25 & 26 Vict. c. 63. These Acts and Orders will be found in the Appendix below, pp. 531, *seq.*

(*e*) By Orders in Council of the following dates:—14th Aug. 1879; 2nd Feb. 1884; 11th Aug. 1884; 9th Oct. 1884; 30th Dec. 1884; 19th May, 1885 (Sweden, Norway, and Brazil); 9th July, 1885 (Turkey); 17th Sep. 1885 (Chili); 17th Nov. 1888 (Denmark).

Production of the Gazette containing the Order in Council making or altering such Regulations, or a copy of the Regulations signed or purporting to be signed by a secretary or assistant secretary of the Board of Trade, or sealed or purporting to be sealed with the seal of the Board of Trade, is sufficient evidence of the due making and purport of such Regulations (*f*). Proof of Regulations.

The Submarine Telegraph Act, 1885 (48 & 49 Vict. c. 49), embodies a convention, to which the principal maritime nations are parties, having for its object the preservation of international telegraphic communication by submarine cables. By Art. 5 of the Convention, vessels laying or repairing cables are required to conform to regulations for preventing collisions agreed upon by the signatory Powers; and by sect. 5 of the Act, the powers to make such regulations contained in the Merchant Shipping Acts are enlarged so as to give effect to regulations made for the purpose of preventing damage to ships laying or repairing cables by other ships, both within and Submarine Telegraph Act, 1885.

(*f*) Previous Regulations made under the same Act were those contained in the Schedule (Table C.) to the Act; also those contained in Orders in Council of 9th January, 1863, and 30th July, 1868. The Regulations of 1863, and of 1868, were repealed by Order in Council of 14th Aug. 1879 as to all ships. Those made by Order in Council of 14th Aug. 1879 (which came into force on 1st Jan. 1880, and are hereinafter called the Regulations of 1880), were repealed as to British, French, Greek, Portugese, Italian, Norwegian, Turkish, and Chilian and Danish ships, by the Orders in Council above mentioned.

It will be observed that the Regulations of 1884, though they apply to British ships everywhere, and to foreign ships within British jurisdiction, do not apply to the ships of all maritime states. To the ships of those states who consented to be bound by the Regulations of 1880, and have not assented to those of 1884, the former Regulations are still applicable. This conflict of Regulations must give rise to difficulty. An International Marine Congress was held at Washington during the present (1890) year, at which an amended Code of Regulations was agreed to by representatives from the principal maritime nations of the world. This Code (hereinafter called the Washington Conference Regulations) will probably be applied, with perhaps some slight modification, to British and foreign ships, by Order in Council made under the powers of 25 & 26 Vict. c. 63. It is set out at length in the Appendix below, p. 548.

For a curious account of the national jealousy aroused at the first proposal to make international Regulations, see Lindsay's History of Merchant Shipping, vol. 3, p. 346.

without the territorial waters. By Arts. 5 and 6 of the Convention, vessels are required not to approach or stay within a nautical mile of telegraph repairing ships or buoyed cables. No such regulations as are referred to in the Convention have been agreed to by all the signatory Powers up to the present date (1890). The signatory Powers are:—Great Britain, Germany, Argentine Republic, Austria, Belgium, Brazil, Costa Rica, Denmark, St. Domingo, Spain, United States, Colombia, France, Guatemala, Greece, Italy, Turkey, Holland, Persia, Portugal, Roumania, Russia, Salvador, Servia, Sweden, Norway, and Uruguay.

Whether Regulations directed to other objects than preventing collision are authorized by 25 & 26 Vict. c. 63.

It has been said that the object of the existing Regulations is not only to prevent collisions, but to minimise their effect (*g*). It is not clear that 25 & 26 Vict. c. 63, enables her Majesty to make Regulations for any object but *to* prevent collisions. Any Regulation, however, directed to mitigate the effect of a collision would probably be held *to* tend to the prevention of collision, and to be well made under the powers given to her Majesty by the Act above mentioned. And it will be observed that it seems to be assumed in the Act (sect. 57) that Regulations "relating to collisions" may be made under its powers. But it may well be doubted whether an enactment, such as Art. 27 of the existing Regulations (of 1884), directed to an entirely different object—namely, the signals to be used by ships in distress—is authorized by the Act.

In what waters they apply.

The Regulations are headed "for preventing collisions *at sea*," and appear to be expressly binding only on ships at sea (*h*). But, except in waters where local rules, incon-

(*g*) See *per* Lord Watson in *The Voorwaarts* and *The Khedive*, 5 App. Cas. 876, 903, 904; and see *Maclaren* v. *Compagnie Francaise de Navigation à Vapeur*, 9 App. Cas. 640, 651, 652.

(*h*) See *per* Brett, L.J., in *The Franconia*, 2 P. D. 8. The *dictum* of the Lord Justice in this case to the effect that the regulations of 1863 are inapplicable in a winding river, cannot mean that they are never applicable in such waters. It must be taken to mean that they are not always applicable in a winding river to ships in such

sistent with the sea Regulations, are in force, it would probably be held that vessels are required to navigate in accordance with the sea Regulations in rivers and harbours, as well as at sea. Many cases have been decided upon the assumption that they apply in rivers and narrow waters (*i*). The words of Art. 25 seem to imply that, except in the cases there mentioned, they apply everywhere. The operation of Art. 21 (the starboard side rule) is certainly not confined to narrow channels "at sea" (*k*). On the sea, everywhere, except where inconsistent (*l*) local rules are in force, they are directly applicable (*m*). Their application in winding rivers and in waters where local rules are in force is considered below under Arts. 21 and 25 (pp. 462, 465).

In a recent case in Scotland the Regulations were held to apply in the river Clyde. Notwithstanding the existence of local rules of navigation applicable to the Clyde, a steamship was held in fault for disobedience to Arts. 13 and 18 of the Regulations of 1863 (*n*). From this decision it appears that in Scotland the Regulations are held to be applicable in rivers, as well as at sea, and that where

positions that they would be bound by them if at sea. The Admiralty Rules of 1851 as to ship's lights were held to apply in the Thames: *Merrison* v. *General Steam Navigation Co.*, 8 Ex. 733. The Order in Council applying the regulations of 1863 to American inland waters, assumes that their operation is not confined to the sea. The Washington Conference Regulations are to be applicable to "all vessels upon the high seas, and in all waters connected therewith, navigable by seagoing vessels."

(*i*) *The Concordia*, L. R. 1 A. & E. 93; *The Velocity*, L. R. 3 P. C. 44; *The Cologne* and *The Ranger*, *ibid.* 4 P. C. 519; *The Owen Wallis*, L. R. 4 A. & E. 175; and see *The Fyenoord*, Swab. Ad. 374; *The Germania*, P. C. 17th June, 1875, cited 1 Maude & Pollock on Shipping, 606, note (*i*); *The Leverington*, 11 P. D. 117. In America the Act of Congress embodying the Regulations of 1863 is expressed to be for preventing collisions "on water." By the Canadian Statute 31 Vict. c. 58, the regulations are applicable over all the inland and other navigable waters of the Dominion.

(*k*) See *The Leverington*, 11 P. D. 117.

(*l*) 43 Vict. c. 29 (Canada), s. 4, makes void local rules which are inconsistent with the regulations.

(*m*) See *The Saxonia*, Lush. 410, as to the application of a former Act to foreign ships in the Solent.

(*n*) *Little* v. *Burns*, *The Owl* and *The Ariadne*, 9 Sess. Ca. 4th ser. 118.

local rules are in force they are to be construed and applied in conjunction with the general Regulations.

To what ships they apply.

The Regulations apply to all seagoing ships and craft, whether large or small, and whether propelled by oars, sails, or steam (*o*). Whether they apply in rivers and harbours to craft intended never to go to sea, as hulks, harbour lighters, and such craft, seems doubtful (*p*). As to their application to her Majesty's ships, ships of foreign governments, and ships sailing under convoy, see Art. 26, *infra*, p. 527.

The Regulations apply to British ships everywhere (*q*). To foreign ships within British jurisdiction they apply directly, as forming part of the municipal law of this country (*r*). They are also applicable to foreign ships out of British jurisdiction, and, in the case of a collision on the high seas, or in foreign waters, are applied to such ships by British Courts by virtue of the statute above mentioned (*s*).

Their international character.

The Regulations of 1863 formed part of the municipal law of this country and of some foreign countries (*t*). They have also been enacted by the legislatures of several British Colonies (*u*). In the United States it has been held that, having been adopted by all maritime nations, the Regulations are of universal application, and form part

(*o*) *Ex parte Ferguson and Hutchinson*, L. R. 6 Q. B. 280; and see 25 & 26 Vict. c. 63, ss. 25, 27, and 28, where the regulations, including those for fishing boats, are spoken of as regulations for *ships*. As to electric ships, see *infra*, p. 359.

(*p*) *The C. S. Butler*, L. R. 4 A. & E. 238. A hulk was held not to be a ship within 17 & 18 Vict. c. 104, s. 55; *European, &c., Mail. Co.* v. *P. & O. Steam Navigation Co.*, 14 L. T. N. S. 704.

(*q*) Subject, it seems, to local rules, and in colonial and foreign waters to colonial and municipal laws.

(*r*) And expressly by 25 & 26 Vict. c. 63, s. 57.

(*s*) See 25 & 26 Vict. c. 63, s. 58, *supra*, p. 340.

(*t*) Amongst others, the United States Act of Congress of 3rd May, 1885, Public Act, No. 100 (Art. 24 being omitted): see *The Belgenland*, 7 Davis, 355; France, Décrets of 25th Oct., 1862; 26 Mai, 1869, and 28th Oct., 1873; Germany Penal Code, Art. 145; Reichgefetzbuch, 127.

(*u*) See Canada, 43 Vict. c. 29; Queensland, 46 Vict. No. 12; South Australia, 44 & 45 Vict. No. 237; Victoria, 28 Vict. No. 255 (*semble*, Regulations of 1863); New South Wales, 35 Vict. No. 7; New Zealand, 41 Vict. No. 54.

of the international or general maritime law of the world (*x*).

Uniform construction of the Regulations desirable.

The international character of the Regulations, and the safety of navigation requires that they should be understood by the seamen of different nations in the same sense. It is therefore of importance that the construction placed upon them by the courts of different countries should be uniform. This has been distinctly recognised in America. The following observations occur in a judgment of a Circuit Court of the United States: "The paramount importance of having international rules, which are intended to become part of the law of nations, understood alike by all maritime powers, is manifest; and the adoption of any reasonable construction of them by the maritime powers named affords sufficient ground for the adoption of a similar construction of our statute by the courts of this country" (*y*).

In the courts of this country the ships of a foreign country to which the Regulations have been applied by Order in Council under 25 & 26 Vict. c. 63, s. 58, will, it is conceived, be bound by the English version of the Regulations. The foreign versions of the Regulations of 1863 were not, in all cases, exactly equivalent to the English version. An important Article of the Portuguese Regulations was open to a construction which was entirely different to that borne by the English version (*z*).

(*x*) *The Scotia* and *The Berkshire*, 14 Wall. 140; *The Belgenland*, 7 Davis, 355; and see *per* Sir R. Phillimore in *The Magnet*, L. R. 4 A. & E. 417, 426, as to their international character. There being in America no law corresponding to 25 & 26 Vict. c. 63, s. 58, the question arose in this case whether the regulations as to lights applied in the case of a collision between an American and a British ship on the high seas. It was held that they did apply, and that the American ship was in fault for having shown a light other than that required by the regulations.

(*y*) *Per* Benedict, J., in *The Sylvester Hale*, 6 Bened. 523; and a similar opinion was expressed by the Court in *The Free State*, Brown, Ad. 251, 261.

(*z*) See correspondence relating to the collision between *The Insulano* and *The City of Mecca*, Parl. Pap. C. 3443, Sess. 1882; *infra*, Art. 16.

Rule for construing them.

The following observations of Jessel, M.R., upon the construction of the Thames Rules appear to supply the rule for construing all Statutory Regulations for preventing collisions. In *The Libra* (*a*) the late Master of the Rolls said: "It must be remembered what these rules are. They are issued for the guidance of masters of vessels; and, therefore, the proper mode of construing them is to read them literally. . . . Certainly rules issued as these are should be construed literally, if they can be construed at all."

In *The Dunelm* (*b*), Brett, M.R., with reference to Art. 9 of the Regulations of 1863, said: "My view of an Act of Parliament—and this article is equivalent to an Act of Parliament—which is made applicable to a large trade or business is, that it should be construed, if possible, not according to the strictest and nicest interpretation of language, but according to a reasonable and business interpretation of it with regard to the trade or business with which it is dealing." And in another case the same learned judge said: "I take it that the basis of the Regulations for Preventing Collisions at Sea is, that they are instructions to those in charge of ships as to their conduct; and the legislature has not thought it enough to say, 'We will give you rules which shall prevent a collision;' they have gone further and said that, for the safety of navigation, we will give you rules which shall prevent risk of collision" (*c*).

The true rule as to their construction is probably that of Jessel, M.R., namely, that they are to be construed literally; but in this sense, that their true meaning is that which the words express and is in accordance with the probable intention of the legislature in framing a code for

(*a*) 6 P. D. 139, 142. See also *per* Brett, M.R., in *The Margaret*, 9 P. D. 47.

(*b*) 9 P. D. 164.

(*c*) *Per* Brett, M.R., *The Beryl*, 9 P. D. 137, 138; and see *infra*, p. 349, as to the circumstances under which the Regulations are applicable.

preventing collisions which is to be applied by practical seamen (*d*).

They furnish the test of negligence.

Where no special circumstances exist to make the Regulations inapplicable, they furnish the paramount rule for the decision of the question as to which ship is in fault in every case of collision. Public policy, as well as the best interest of all concerned, requires that they should be enforced in all cases to which they apply (*e*). Departure from them is justifiable only in one event; namely, where it is necessary in order to avoid immediate danger (*f*). It is not justifiable on the ground that, under the circumstances of the case, it would be better seamanship not to comply with them (*g*); or on the ground that by departing from them the violence of the blow would be lessened (*g*). But though the Regulations in ordinary cases afford a test of negligence, and in some cases proof of departure from them is equivalent to proof of negligence, they are not to be applied mechanically, to determine whether a ship is in fault for a collision. Even where a position of risk is established, and a particular article proved to have been applicable, a vessel will not be held in fault for non-compliance with it, if the time during which it was applicable was so short, or the circumstances so startling, that a seaman of ordinary skill, care, and nerve might reasonably be excused for not having appreciated the situation in time to enable him to obey the law (*h*).

Where the Regulations are clearly inapplicable, as where the ship cannot take the step required without going ashore, or endangering herself or other vessels, the question which ship is in fault is tried, without regard to

(*d*) The draughtsmanship of the Regulations leaves much to be desired, from the point of view of both the draughtsman and the seaman.

(*e*) *New York and Liverpool U.S. Mail Steamship Co.* v. *Rumball*, 21 How. 372, 383; and see *The Bygfoged Christensen*, 4 App. Cas. 669, *infra*, p. 489; *The Voorwaarts* and *The Khedive*, 5 App. Cas. 876.

(*f*) See below, Art. 23, p. 480, as to the circumstances under which departure from the Regulations is allowed.

(*g*) *The Voorwaarts* and *The Khedive*, 5 App. Cas. 876, 895.

(*h*) *The Voorwaarts* and *The Khedive*, 5 App. Cas. 876, 902; *The Theodore H. Rand*, 12 App. Cas. 247.

the Regulations, by the ordinary rules of seamanship. Provided they are not inconsistent with the Regulations, the rules or practice of seamen, although they have not the force of law, are equally binding with the Regulations, and upon British and foreign ships alike (*i*).

Circumstances under which Regulations are applicable; risk of collision.

The question as to the time and circumstances at and under which the Regulations become applicable was discussed by Brett, M.R., in *The Beryl* (*j*). The Master of the Rolls, and the other members of the Court of Appeal (Bowen and Fry, L.JJ.), held that the Regulations were intended not only to prevent collision, but to prevent risk of collision; and that it is a rule of interpretation of the Regulations, that "they are all applicable at a time when the risk of collision can be avoided, not that they are applicable when the risk of collision is already fixed and determined." The Court laid stress upon the words "so as to involve risk of collision," which occur in Arts. 14, 15, 16, 17 (*k*), and 18, and held that they do not refer to an existing risk of collision, but point to a time before risk of collision has arisen, and where it is, or ought to be, apparent that there will be risk, if nothing is done to prevent it. "Another rule of interpretation of these Regulations is (the object of them being to avoid risk of collision), that they are all applicable at a time when the risk of collision can be avoided—not that they are applicable when the risk of collision is already fixed and determined. We have always said that the right moment of time to be considered is that which exists at the moment before the risk of collision is constituted" (*l*). So in *The Stan-*

(*i*) As to the mode of proving matters of nautical skill and seamanship, see *supra*, p. 312.

(*j*) 9 P. D. 137; and in *The Dordogne*, 10 P. D. 6. See also *The Ebor*, 11 P. D. 25, 29; *The Memnon*, 6 Asp. M. C. 317.

(*k*) In Art. 17 the words "such directions" are substituted for "so."

(*l*) *Per* Brett, M.R., *The Beryl*, 9 P. D. 137, 140. It is submitted that this view of the application of the steering and sailing rules—that the steps required by them are to be taken, not only where there is risk of collision, but where there is no risk, and only a probable risk—will raise serious difficulties, both for seamen and the law Courts. Previously to *The Beryl*, the view of the English Courts seems to

more (*m*), Brett, M.R., held the Regulations to apply where there is "a probability of risk."

What constitutes risk of collision it is difficult to define; "It was utterly impossible for the Legislature to have determined, or described, what should constitute risk of a collision; for that must always be decided, according to the circumstances of each case, by men of nautical experience" (*n*). It has been described as a "chance," a "probability," a "strong," or a "reasonable" (*o*) probability of collision; and distinguished from a "possibility" of collision (*p*). In a case under 14 & 15 Vict. c. 79, Dr. Lushington said: "This chance of collision is not to be scanned by a point or two. We have held over and over again that if there be a reasonable chance of collision it is quite sufficient. . . . We have never got to this, and I hope never shall, that it (the rule) applies where two vessels are sailing properly, and there is no chance of a collision" (*q*). In another case the same learned judge said: "The whole evidence shows that it was the duty of *The Colonia* with the wind free to have made certain of avoiding *The Susan*. She did not do so, but kept her course till she was at so short a distance of a cable-and-a-half's length, in the hope that the vessels might pass

What constitutes "risk of collision."

have been that the regulations (the steering and sailing rules) applied only where there was risk of collision; and it is submitted that this is the more natural and more beneficial construction. The danger is that two minds will seldom agree as to there being a probability of risk. The actual existence of risk is a fact about which there can be less doubt. Cp. *The General U. S. Grant*, 6 Bened. 465, *infra*, p. 478. Similar words occur in 17 & 18 Vict. c. 104, s. 296, and were commented upon by Dr. Lushington in *The Inflexible*, Sw. 32. In an American case, *The Milwaukee*, Brown, Ad. 313, the view of Brett, M.R., in *The Beryl*, seems to have been taken, that the regulations apply before there is actual risk.

(*m*) 10 P. D. 134.

(*n*) *Per* Dr. Lushington in *The Mangerton*, Swab. Ad. 120.

(*o*) *The Cleopatra*, *ibid.* 135; *The Ericsson*, *ibid.* 38; *The Duke of Sussex*, 1 W. Rob. 276; *The Dumfries*, Swab. Ad. 63, 65; with reference to the same expression in 17 & 18 Vict. c. 104, s. 296.

(*p*) *The Ericsson*, Swab. 38; but see *The Voorwaarts* and *The Khedive*, *per* Lord Hatherley, 5 App. Cas. 876, 905; and *per* Pollock, C. B., *General Steam Navigation Co.* v. *Mann*, 14 C. B. 127, 132.

(*q*) *The Sylph*, 2 Sp. E. & A. 75, 82.

each other. Now it never can be allowed to a vessel to enter into nice calculations of this kind, which must be attended with some risk, whilst it has the power to adopt, long before the collision, measures which would render it impossible" (*r*).

Indications of risk. Approaching ship not altering her bearing.

In practice, one of the most usual indications of risk of collision is that the approaching ship remains upon the same bearing from the observing ship for an appreciable length of time (*s*). If the bearing alters quickly when the ships are a considerable distance apart, there is no risk.

Opening or closing of mast-head and side light.

Another indication of risk of collision at night is the alteration of the apparent horizontal distance between an approaching steamship's masthead and side light. This alteration usually indicates a change in direction of the approaching ship's head and course, but it is of little value in estimating risk of collision, unless the relative positions of the masthead and side lights are known. Steamships' side lights are seldom carried exactly abreast of her masthead light, and are often a considerable distance forward or aft of it. In most vessels, they are carried abaft the masthead light; but in some of the newer vessels and in ocean liners, they are carried in miniature lighthouses erected on the deck forward of the masthead light. When the relative position of the lights is known, the alteration in the ship's course may be known by the following rule:—

Where the side light is abaft the masthead light, the apparent distance between those lights increases as the ship's head turns away from the observer; as they close, the ship's head is turning towards him (*t*). Where the

(*r*) *The Colonia*, 3 Not. of Cas. 13, note.

(*s*) In the Washington Conference Regulations (Art. 17), risk of collision is defined with reference to this fact.

(*t*) Except in the case of an observer abaft the line at right angles to a line joining the mast head and side lights (supposing them to be in the same horizontal place), a case which for the present purpose may be neglected. *The Stanmore*, 10 P. D. 134, is an instance of the rule stated in the text.

side light is forward of the masthead light, the masthead and side lights broaden as the ship's head is turning towards an observer forward of a line joining the masthead and side lights; whilst to an observer abaft that line, the lights are at the same time closing (*u*).

In estimating risk of collision, it seems that the possibility of the other ship being unable to comply with the Regulations, or of her negligently departing from them, is not, at least under ordinary circumstances, to be taken into consideration (*x*).

Risk of collision, such as will bring into operation Art. 18 (requiring a steamship under certain circumstances to slacken her speed or to stop and reverse), appears to be of a more imminent character than that which brings other articles into operation. The question will be considered below in connection with Art. 18.

American cases as to the meaning of "risk of collision."

The difficulty of defining the moment at which these Regulations become applicable has been recognised by the American Courts (*y*). The following passage from a judgment of the Supreme Court of the United States expresses the general rule as to the time at which and during which they become and remain applicable:—"Rules of navigation, such as have been mentioned (as to the duties of two vessels approaching each other), are obligatory upon such vessels when approaching each other from the time the necessity for precaution begins; and they continue to be applicable as the vessels advance so long as the means and opportunity to avoid the danger remain. They do not apply to a vessel required to keep her course after the approach is so near that the collision is inevitable, and are equally inapplicable to vessels of every description while they are yet so distant from each other that measures of

(*u*) Except in the case of an observer abaft the line at right angles to that joining the mast head and side lights: a case which for the present purpose may be neglected.

(*x*) *The Jesmond* and *The Earl of Elgin*, L. R. 4 P. C. 1.

(*y*) *The Nicholls*, 7 Wall. 656.

precaution have not become necessary to avoid a collision" (z).

It would therefore seem that the Regulations do not apply, or at least that departure from them is justifiable, where the collision is in fact inevitable, though there appears to be a chance of escape by departing from the Regulations (a).

In *The Milwaukee* (b), it was said by the same Court that where vessels are meeting or passing in a crooked and narrow channel there is always risk of collision.

In *The Libra* (c) decided under the Thames Rules, in which the same phrase, "risk of collision," occurs, Brett, L. J., considered that, when the vessels were each rounding a point upon concentric circles of different diameters, and so that they would clear each other without further alteration of the helms than the course of the river required, there was no risk of collision.

Uncertainty as to facts causing risk.

The distance, rate of sailing, and course of another vessel, and the direction of the wind, are never known exactly, and in practice there is often difficulty in determining the moment at which, and the manner in which, the Regulations are to be applied (d). In judging of the course and probable movements of a strange vessel, it must be assumed, under ordinary circumstances, that she can, and will, comply with the Regulations (e).

(z) *The Wenona*, 19 Wall. 41, 52. Similar expressions occur in the judgments in *The Nicholls*, 7 Wall. 656; *The Johnson*, 9 Wall. 146; and *The Dexter*, 23 Wall. 69.

(a) See *The Benares*, 9 P. D. 16.

(b) Brown, Ad. 313.

(c) 6 P. D. 139, *infra*, p. 585.

(d) In the Courts, owing to the form of the pleadings, the question as to the moment when the regulations become applicable, does not often arise.

(e) *The Jesmond* and *The Earl of Elgin*, L. R. 4 P. C. 1; see also *The Free State*, 1 Otto, 200, for a decision of the Supreme Court of the United States to the same effect. The view seems to have been taken in some American cases that the steps required by the Regulations should be taken, and the helm altered, before any risk is incurred, if the courses are such that, if continued, there would be risk; see *The Milwaukee*, Brown, Adm. 313, 331. In the same case, it was held that the chance of the other vessel disobeying the Regulations must be taken into account. *Sed qu.*

Where there is no risk of collision, a vessel that improperly alters her helm so as to bring about a collision will be held to be in fault (*f*). Alteration of course so as to cause risk.

If a vessel is disabled, or slow in answering her helm, it is her duty to be prompt in taking the measures required by the Regulations (*g*).

If a ship sees another in a position that may involve risk of collision, but is unable to make out what course the other is on, she should keep her course, and not alter her helm, or take any decisive step until she has ascertained the other ship's course (*h*). "The mere discovery of a strange light does not necessarily immediately bind a person in charge of a vessel to follow any particular rule; but as soon as he has opportunity of ascertaining, by reasonable care and skill, what the strange vessel is, and what course she is pursuing, then the rule which is applicable to the circumstances at once become binding on him" (*i*). Regulations not applicable until facts known.

An alteration of the helm in a fog when the other ship cannot be seen and only her whistle is heard, is not necessarily negligence, though it is made merely upon a guess as to the distance, course, speed, and direction of the other ship (*k*). Alteration of helm in fog.

An alteration of the helm made for greater safety when there is no risk of collision will not be held to be a fault. A sailing ship (in 1856) seeing a green light from two to four points on her starboard bow, and distant about a mile and a half, put her helm to starboard, and subsequently Alteration for greater safety, where no risk.

(*f*) *The Kezia* and *The Eliza*, Holt, 67; *The Dapper* and *The Lady Normanby*, *ibid.* 79; *The Velocity*, L. R. 3 P. C. 44; *The Esk* and *The Niord*, L. R. 3 P. C. 436; *The Inflexible*, Swab. Ad. 32; *The Seaton*, 9 P. D. 1.

(*g*) *The Test*, 5 Not. of Cas. 276.

(*h*) *The Rona* and *The Ava*, 2 Asp. Mar. Law Cas. 182; *The James Watt*, 2 W. Rob. 270; *The Moderation*, 1 Mar. Law Cas. O. S. 413; *The Bongainville* and *The James C. Stevenson*, L. R. 5 P. C. 316, 321.

(*i*) *Per* Dr. Lushington, *The Great Eastern*, 2 Mar. Law Cas. O. S. 97.

(*k*) *The Vindomara*, 14 P. 172; affd. in H. L., 60 L. J. Ad. 1.

came into collision with the other ship. It was held that she was not in fault for starboarding (*l*).

So where a steamship, having another two points on her port quarter, and overtaking her on a course converging with her own, ported and hard-a-ported when the latter was three lengths off, it was held that she had broken no rule of navigation, and was not in fault (*m*).

Cases in which there was "risk of collision."

It has been held that the vessels were approaching "so as to involve risk of collision" in the following cases:—Two steamships meeting on nearly opposite courses at a joint speed of eighteen or nineteen knots, and distant a mile and a half (*n*); a steamship and a sailing-ship, distant two or three miles, and meeting at a joint speed of seventeen knots, the steamship not being able to make out the course of the sailing-ship, but knowing that it was probably nearly opposite to her own (*o*); a steamship two points on the quarter of another and overtaking her, distant a mile or less than a mile (*p*); a steamship overtaking another upon a converging course, and distant three miles (*q*). Where two sailing vessels were approaching each other on courses only half a point from being directly opposite, at a joint speed of twelve knots, and distant from each other two or three miles, it was held by the Supreme Court of the United States that there was risk of collision (*r*).

In *The Banshee* (*s*), a steamship was going seventeen knots in Dublin Bay, and overtaking another going ten or twelve. The latter was 800 yards ahead, and the overtaking vessel was going in such a direction as to pass within a ship's length of her. It was held that there was no risk of collision, and that the leading ship was not in fault for not keeping her course. *Sed qu.*

(*l*) *The Sylph*, Swab. Adm. 233; but see *The Corsica*, 9 Wall. 630; *infra*, p. 479.

(*m*) *The Franconia*, 2 P. D. 8, 13.

(*n*) *The Jesmond* and *The Earl of Elgin*, L. R. 4 P. C. 1.

(*o*) *The Bongainville* and *The Jas. C. Stevenson*, L. R. 5 P. C. 316.

(*p*) *The Franconia*, 2 P. D. 8.

(*q*) *The Seaton*, 9 P. D. 1.

(*r*) *The Nicholls*, 7 Wall. 656; and see *The Cayuga*, 14 Wall. 270.

(*s*) 6 Asp. M. C. 221.

When two ships are approaching each other with risk of collision, the rule of the road applies once and for all to take them clear. A ship is never required by the Regulations, after having sighted another, to alter her course first to starboard and then to port; or, first to keep her course and then to keep out of the way; or *vice versâ*. In the case, for example, of steamships meeting end on, or nearly so, each is required by Art. 15 to alter her course to starboard. If, while under the port-helm, the relative positions and heading of the ships are changed, so that from meeting ships they become crossing ships, the meeting rule (Art. 15) does not cease to operate, or give place to the "crossing" rule (Art. 16). The manœuvre of porting must be persisted in until the risk of collision is determined. If porting will not take the ships clear, Art. 18 or Art. 23 may apply, and the engines may be stopped, or any other step taken which is necessary to avert collision; but the ships cannot afterwards, and whilst the risk continues, become crossing ships. If once a ship is within the "meeting" rule, or any other rule requiring her to take or keep a definite course, or requiring her to keep out of the way, she cannot, whilst the risk continues, come within the operation of the "crossing" rule, or any other rule requiring her to adopt a different manœuvre. The object of the rule of the road and of the Regulations would be entirely frustrated if it were possible for a ship to be thrown from one rule to another; if, whilst in the act of obeying one article, she were suddenly to come within the operation of another article, requiring her, perhaps, to take an exactly opposite course, and so making the previous manœuvre of no effect.

When the "meeting" or "crossing" rule applies, it continues to be applicable until the risk is determined.

The precautions required by the law to be taken where there is risk of collision must be taken in time to determine that risk (*t*). An alteration of the helm, or other

The Regulations must be complied with promptly and effectually.

(*t*) *The Trident*, 1 Sp. E. & A. 217, 222.

step taken in pursuance of the Regulations, is no defence, unless it is shown that such precaution was taken at the proper time. To be effectual, precautions must be seasonable. If taken at an improper time they are not a compliance with the Regulations, and are no defence. "If you adopt a measure at an improper time it does not take away the culpability of not having done it before and prevented the accident" (*u*).

Close shaving.

A vessel is not justified in delaying to take precautions until the last moment; or in trusting to being able to "shave" clear of the other (*x*). If by doing so she frightens the other into taking a wrong step, and a collision occurs, she will be responsible for the entire loss (*y*). By a prompt compliance with the Regulations, where a vessel is required to alter her course to avoid another, she apprises the latter of her ability and intention to comply with the Regulations; whereas by delaying to take the required step, she may lead the other vessel to suppose that she is unable to comply with them, and cause her to take a step which may make a collision inevitable. Where a ship, in order to show that she is free from blame, is required to prove that she altered her course at the proper time, it is not enough for her to show that her helm was altered at that time; she must prove that she answered her helm (*z*) in time.

Regulations apply until risk finally determined, or ships clear.

Where, by the action of the helm in accordance with the Regulations, risk of collision has apparently been determined, but in fact it continues, and the risk again becomes apparent, the Regulations are not complied with unless the steps required by them to be taken are taken and persisted

(*u*) *Per* Dr. Lushington in *The Stadacona*, 5 Not. of Cas. 371, 374; *The Fenham*, L. R. 3 P. C. 212 (as to lights). The view taken by the Courts of the United States is the same; *The Johnson*, 9 Wall. 146; *The Vanderbilt*, 6 Wall. 225; *The Syracuse*, 12 Wall. 167; *The Sunnyside*, 1 Otto, 208; *The America*, 2 Otto, 432.

(*x*) *The John Brotherick*, 8 Jur. 276; *The Benefactor*, 14 Blatchf. 254.

(*y*) See above, p. 3.

(*z*) *The La Plata*, Swab. Adm. 220.

in up to the time of collision or until the ships are clear. Thus where, by porting, a steamship, A., shut in the green of B., a steamship which had been approaching her with all her lights showing, and shortly afterwards, owing to the perverse starboarding of B., her green again became visible to A., and thereupon A. again ported and again shut in B.'s green, but B. continued to starboard, and again showed her green to A.; though A. ported a third time, it was held that she was in fault, because she did not stop and reverse when B. (*a*) showed her green for the third time.

Ship to be provided with required appliances.

A vessel sailing upon a voyage that may not be terminated until a Regulation as to lights or fog-signals comes into force, and which is enacted, but not in force, when she sails, must, if possible, be provided with fog-signals, lights, and whatever is necessary to enable her to comply with the Regulation when it comes into force (*b*).

Practice or custom inconsistent with the Regulations cannot be good.

No alleged practice of seamen of avoiding other ships by taking measures other than, and inconsistent with, those required by the Regulations is recognized by the law. A defendant cannot be heard to allege such a practice as an excuse for a violation of the Regulations (*c*). Where a custom was set up that merchant ships should keep out of the way of Queen's ships coming out of Devonport harbour by the deep water channel, it was held that it was not binding in law (*d*). On the same principle, under former Acts requiring ships to navigate on the starboard side of a river, it was held that it was no excuse for a vessel on her wrong side that she was keeping out of the strength of the tide (*e*). So a custom to treat sailing ships in the trades as close-hauled, when in fact they are a point or two free,

(*a*) *The Arratoon Apcar*, 15 App. Cas. 37.
(*b*) *The Love Bird*, 6 P. D. 80.
(*c*) *The Sylph*, 2 Sp. E. & A. 75; *The Unity*, Swab. Ad. 101; *The Hand of Providence*, *ibid.* 107; *The Araxes* and *The Black Prince*, 15 Moo. P. C. C. 122; *The Velocity*, L. R. 3 P. C. 44, 50.
(*d*) *The Promise* and *H.M.S. Topaz*, 2 Mar. Law Cas. O. S. 38.
(*e*) Below, p. 468.

was disregarded by the Courts in applying Arts. 14 and 22 (*f*).

The penalties attached to non-observance of the Regulations have been considered in former chapters (*g*).

THE REGULATIONS.

The following are the Regulations which came into force on the 1st of September, 1884. At the present date (1890) they apply exclusively to British, French, Italian, Greek, Portuguese, Norwegian, Swedish, Brazilian, Turkish, Chilian, and Danish ships and boats (*h*). The Regulations of 1880, which apply to the vessels of other countries, are identical with those of 1884, except as regards fishing-boats' lights and some matters of minor importance, which are noted in the text below. The existing Regulations are substantially the same as those of 1863. Many of the cases cited below arose under the earlier Regulations, but are, it is submitted, binding authorities upon the points for which they are cited as to the construction and effect of the existing Regulations (*i*). The Regulations are set out in the Appendix below (*k*). Those of 1880 will be found L. R. 4 P. D. p. 241 ; and those of 1884, L. R. 9 P. D. p. 247.

(*f*) *The Earl Wemyss*, 6 Asp. M. C. 364 ; on App. 61 L. T. N. S. 289.

(*g*) See pp. 38, 298, 300, above.

(*h*) See above, p. 344.

(*i*) Cf. *per* James, L. J., L. R. 5 Ch. 706 :—"Where once certain words in an Act of Parliament have received a judicial construction in one of the superior Courts, and the Legislature has repeated them, without any alteration, in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a court of competent jurisdiction has given them."

(*k*) *Infra*, p. 537. In the same Appendix (*infra*, p. 548) will be found the text of the Regulations approved by representatives from the Governments of the principal maritime nations at the International Marine Conference held at Washington in 1890. It is probable that these (Washington) Regulations will, before long, be enacted in the place of the existing Regulations.

Regulations for preventing Collisions at Sea.

Preliminary.

Article 1 (*l*).

Art. 1.

Definitions: "Sailing ship;" "steamship."

In the following rules, every steamship which is under sail and not under steam is to be considered a sailing ship; and every steamship which is under steam, whether under sail or not, is to be considered a ship under steam.

This Article is identical with Art. 1 of the Regulations of 1863, and with Art. 1 of those of 1880.

"Under steam:" meaning of the term.

A steam-tug lying-to under sail, with her engines idle and her fires banked up, is "under steam" within the meaning of Art. 1, and must keep out of the way of a sailing ship (*m*).

In *The American* and *The Syria* (*n*), a disabled steamship not under steam or sail, and being towed, was carrying her side lights and no mast-head light. It does not appear that she was considered to be wrong in so doing.

Special lights are provided for British steam trawlers; see p. 382, below.

It appears that, by virtue of 52 & 53 Vict. c. 46, s. 5, ships propelled by electricity or other mechanical power are steamships within the meaning of the Regulations, so far as a British statute can make them so.

Rules concerning Lights.

Article 2 (*o*).

Art. 2.

The lights mentioned in the following Articles numbered 3, 4, 5, 6, 7, 8, 9, 10, *and* 11, *and no others* (*p*), *shall be carried in all weathers from sunset to sunrise* (*q*).

(*l*) Corresponding to the preliminary paragraph of the Washington Regulations.

(*m*) *The Jennie S. Barker* and *The Spindrift*, 3 Asp. Mar. Law Cas. 42. *The Sunnyside*, 1 Otto, 208, is a similar decision by the Supreme Court of the U. S. See *The Byron*, *infra*, p. 415.

(*n*) L. R. 6 P. C. 127.

(*o*) Corresponding to part of Art. 1 of the Washington Regulations.

(*p*) "No other lights which may be mistaken for the prescribed lights" (Washington Regulations).

(*q*) By a curious mistake the lights mentioned in the schedule to

Art. 2.

This Article corresponds with Art. 2 of the Regulations of 1863, and with Art. 2 of those of 1880.

It appears that by the maritime law there was no obligation upon a ship to carry a light at night. It depended upon the darkness of the night, and other circumstances, whether a light was necessary or not (*r*). Even so late as 1852, sailing ships did no more than exhibit a light as occasion required, though steamships were at that date by law required to carry lights as at present.

Neglect of the Regulations as to lights in unfrequented waters.

There is reason to think that the law as to ships' lights is frequently broken, especially by sailing ships in unfrequented waters. *The Kapunda* disaster (1887), in which 299 lives were lost, was caused by a sailing ship in the South Atlantic carrying no lights. At the inquiry held in that case, it was stated by reliable witnesses that it is a common practice for cargo ships out of the track of ships to carry no lights.

A tug is a steamship within the meaning of the Regulations.

The effect of this Article, when read together with Article 4 and the following Articles, is to place a steamship towing another vessel in the same category, generally speaking, with other steamships; that is to say, the fact that she is engaged in towing does not exempt her from the obligations otherwise imposed on her by the Regulations (*s*).

Circumstances under which a ship may show lights other than the Regulation lights.

Notwithstanding the express prohibition contained in this Article (*t*) against carrying lights other than the Regulation lights, a ship may, and it is her duty to, exhibit such a light under exceptional circumstances, when it is necessary to warn an approaching ship that does not see her danger. Thus, in one case, a vessel beating down Channel saw, on her bow, and not altering its bearing, the

25 & 26 Vict. c. 63, were required to be carried from *sunrise to sunset*. This law was in force in the Mersey for some years.

(*r*) *The Victoria*, 3 W. Rob. 49; *The Iron Duke*, 4 Not. of Cas. 94; *The Londonderry*, *ibid.*, Suppl. xxxi. But see *contra*, *per* Dr. Lushington in *The Saxonia*, Lush. 410, as to a vessel at anchor.

(*s*) *The American* and *The Syria*, L. R. 4 A. & E. 226; S. C. on app., *ibid.* 6 P. C. 127; *The Warrior*, L. R. 3 A. & E. 553.

(*t*) And in 25 & 26 Vict. c. 63, s. 27, where the words are "carry and exhibit."

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light of another running up Channel. She burnt a blue light over her quarter in order to attract attention. It was held that she was not in fault for so doing (*u*). This is an important decision; for previously it had been argued that the wording of the Regulations threw doubt upon the legality of the common and useful practice of burning a flare or a blue light to attract attention in case of imminent danger. It would appear, however, that under these circumstances the exhibition of a flare is authorized by Art. 24 (*x*).

So a ship ashore (*y*), or sunk (*z*), in a navigable channel, or casting-off from her moorings (*a*), or being overtaken at night by a ship that appears not to see her, so that there is risk of collision, must keep a good look-out and warn the approaching ship of the danger. By Art. 11 (*infra*, p. 391), provision is expressly made for showing a light astern to an overtaking ship. Before that Article was promulgated it was held that a ship was not in fault for showing over her stern to an approaching vessel one of her side lights (*b*); also, that there was no duty cast upon a vessel being overtaken to show any light astern, until it became clear that the overtaking ship was not keeping out of the way (*c*).

The duty of lighting sunken ships and wrecks is, under certain circumstances, cast upon the harbour or lighthouse authority of the district (*d*). Care should be taken that

(*u*) *The Simla* and *The City of Lucknow*, Ad. Div. March, 1884; Ship. and Merc. Gazette, 8th March, 1884; followed in *The Merchant Prince*, 10 P. D. 139 (a flare); cf. *The Narragansett*, 20 Blatchf. 37; *The Eleonora*, 17 Blatchf. 88.

(*x*) See *The John Fenwick*, L. R. 3 A. & E. 500, 502. The Washington Regulations (Art. 12) expressly authorize the use of the flare, and of detonating signals under the circumstances supposed.

(*y*) *The Industrie*, L. R. 3 A. & E. 303; *The Thomas Lea*, 3 Asp. Mar. Law Cas. 260.

(*z*) *The Douglas*, 7 P. D. 151.

(*a*) *The John Fenwick*, L. R. 3 A. & E. 500.

(*b*) *The Anglo-Indian*, 3 Asp. Mar. Law Cas. 1.

(*c*) *The Jane Bacon*, 27 W. R. 35.

(*d*) See 40 & 41 Viet. c. 16, and the various local Acts. *Dormont* v. *Furness Railway Co.*, 11 Q. B. D. 496, was a case where the duty was held to be cast upon the local authority. See also cases cited *supra*, p. 98.

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the lights used for this purpose are not such as may mislead other vessels. In an unreported case (*e*), a collision with a wreck was caused by the wreck being lit with two vertical white lights, which were mistaken for those of a tug.

Lights must be carried in the positions required by the law.

The Regulation lights should be exhibited in the positions required by the law (*f*), although there are circumstances which would make it appear desirable to exhibit them elsewhere. When there is a haze on the water which obscures the riding light at the elevation required by the Regulations, it seems that a ship would not be held in fault for exhibiting the riding light elsewhere (*g*).

If lost must be replaced.

It is the duty of a ship that has lost her lights by bad weather or other accident to replace them as soon as possible (*h*).

No excuse for absence of lights that they were being trimmed.

It is no excuse for not carrying the Regulation lights that they were being trimmed, or that they went out by accident (*i*).

Misleading lights.

A wrong and misleading light will almost certainly cause the ship carrying it to be held in fault if a collision occurs (*k*).

Spare lights.

Notwithstanding the express terms of the Regulations, that the lights shall be carried, it seems that a ship will not necessarily be held in fault for a collision caused by the absence of lights, or by improper lights, if the Regu-

(*e*) Ad. Div. 1885.

(*f*) As to the height of the second riding light required in the Humber, see *The Magneta*, 15 P. D. 101, *infra*, p. 567.

(*g*) *The Michelino* and *The Dacca*, Mitch. Mar. Reg., May 25, 1877. In this case it was alleged that there existed at Rangoon a local rule as to riding lights inconsistent with the general Regulations.

(*h*) *The Saxonia* and *The Eclipse*, Lush. 410, 422; *The Aurora* and *The Robert Ingram*, *ibid.* 327; *The Grey Eagle*, 1 Bissel, 476; 2 Bissel, 25.

(*i*) *The C. M. Palmer* and *The Larnax*, 2 Asp. Mar. Law Cas. 94; *The Flora Macdonald* and *The Palestine*, Holt, 52; *The Eclipse* and *The Saxonia*, *supra*; *The Victoria*, 3 W. Rob. 49; *The Sylph*, 2 Sp. E. & A. 75, 85.

(*k*) *The Scotia* and *The Berkshire*, 7 Blatchf. 308; 14 Wall. 170; *The Rob Roy*, 3 W. Rob. 190; *The Mary Hounsell*, 40 L. T. N. S. 368; *The Lorne*, 2 Stuart's V. Ad. Rep. (Canada) 177 (ship at anchor with a green light showing).

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lation lights have been destroyed, and there are no spare ones on board. The point, however, has not been expressly decided. A steamship at anchor, with her mast-head light up instead of her proper riding light, was held free from blame. Her riding light had been broken shortly before the collision in a previous collision for which she was not in fault (*l*).

The duty to equip a ship with fog-signals before sailing upon a voyage, so that she may be able to comply with a Regulation that is enacted, but not in force, when she sails, was insisted upon in *The Love Bird* (*m*). The same rule would apply to ships' lights.

Obscuration of lights.

The Regulation lights must not be obscured in any way. A flare must not be burnt so as to make them indistinct (*n*). If a steamship has the wind aft, so as to blow her smoke ahead and thereby obscure her lights, it is her duty to slacken and not go at full speed (*o*). Where a ship carried a bright light in her cabin, which showed on deck and obscured her side lights, and the other ship alleged that she mistook it for a riding light, the former was held in fault for the collision (*p*).

Lights to be always carried.

The fact that it is only a short time after sunset, and fine and clear weather, does not relieve a ship from the obligation to carry lights (*q*). Under the Admiralty Regulations as to lights it was held that "it is not to be said that because it was a bright night it was not necessary to obey the Act of Parliament" (*r*). By the existing Regulations (Art. 2) vessels are expressly required to carry them in all weathers. When, on account of bad weather,

(*l*) *The Kjobenhavn*, 2 Asp. Mar. Law Cas. 213; but see *The Sylph*, 2 Sp. E. & A. 75; *The Rob Roy*, 3 W. Rob. 190; *The C. M. Palmer*, 2 Asp. Mar. Law Cas. 94; *The Benares*, 9 P. D. 16; for cases of ship's lights going out and misleading the other ship.

(*m*) 6 P. D. 80.

(*n*) *The Sea Nymph of Chester*, Holt, 34.

(*o*) *The Rona* and *The Ava*, 2 Asp. Mar. Law Cas. 182.

(*p*) *The Ida* and *The Mary Ida*, Ad. Div., Feb. 5th, 1878.

(*q*) *The Emperor* and *The Zephyr*, Holt, 24.

(*r*) *The City of London*, Swab. Ad. 245, 249.

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it is not possible to carry them fixed, Art. 7 may apply, and proper lights must be exhibited from the deck (*s*).

Special lights required by local rules.

Special lights are required to be exhibited by dumb barges and dredgers and other craft in the river Thames, by ships at anchor in the Mersey and its approaches, by flats and vessels without masts in the Mersey (*t*), by magazines for explosives moored in the Mersey (*u*), and by vessels at anchor and dumb craft in the Humber, Ouse, and Trent rivers. At Penarth, two bright lights are worn by ships ready to dock. Private signal lights for vessels belonging to the same owner, and flash lights (*x*) for drift-net fishing-boats (*y*), and quarantine (*z*) lights (a lantern at the masthead, or in case of plague two lanterns), are also enjoined by statute when in sight of other ships or within two leagues of the United Kingdom (*z*). Day and night signals for pilots, and for vessels in distress, are provided by 36 & 37 Vict. c. 83; the provisions as to distress signals are also embodied in the Regulations of 1884 (Art. 27).

In America, coasting and inland steamships are required to carry lights other than those described in Art. 2 (*a*). In the Suez Canal, ships not under way exhibit two lights (*b*). There are special rules as to lights for ships in Swedish waters (*c*).

In some British colonies the local legislatures have enacted laws as to ships' lights that are not in all cases consistent with the Regulations (*d*).

Consequences

A master or owner wilfully neglecting to carry lights in

(*s*) See *infra*, p. 376.

(*t*) For the Thames, Mersey, and other local Regulations as to lights, see the Appendix, *infra*.

(*u*) Under 14 & 15 Vict. c. 67, and 46 & 47 Vict. c. 184 (Local); see London Gazette, 23rd Dec. 1883.

(*x*) 36 & 37 Vict. c. 85, ss. 18—21.

(*y*) As to these, see Art. 10, *infra*.

(*z*) 6 Geo. IV. c. 78, ss. 8, 9. This Act appears to be still in force.

(*a*) Act of Congress of 28th Feb., 1871, c. 100; *The Continental*, 14 Wall. 345.

(*b*) See App., p. 572, *infra*.

(*c*) See Nautical Magazine, 1880, p. 591.

(*d*) As to New South Wales, see 35 Vict. No. 7, s. 94; New Zealand, 41 Vict. No. 54, s. 172. For other colonial laws on the subject, see above, p. 344.

accordance with the Regulations is guilty of a misdemeanour, and punishable with a fine of 100*l.* or imprisonment for six months (*e*). And a ship proceeding to sea may be stopped, if she is not properly supplied with lights and screens, or if they are improperly placed (*f*). It has been held that, as regards third parties, the shipowner, and not the pilot, is responsible for proper lights being carried (*g*).

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Penalty of not carrying lights to shipowner and master.

Article 3 (*h*).

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Lights for steamships.

A seagoing steamship (*i*) *when under way shall carry :—*

(a) *On or in front of the fore-mast, at a height above the hull of not less than twenty feet, and if the breadth of the ship exceeds twenty feet, then at a height above the hull not less than such breadth* (*k*), *a bright white light so constructed as to show an uniform and unbroken light over an arc of the horizon of twenty points of the compass; so fixed* (*l*) *as to throw the light ten points on each side of the ship, viz., from right ahead to two points abaft the beam on either side; and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles.*

(b) *On the starboard side a green light so constructed as to show an uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.*

(c) *On the port side a red light so constructed as to show*

(*e*) 25 & 26 Vict. c. 63, s. 27. It is said that lights are often not carried at sea.

(*f*) 25 & 26 Vict. c. 63, s. 30; and see, as to fishing craft, 46 & 47 Vict. c. 92, ss. 6, 12.

(*g*) *The Ripon*, 10 P. D. 65.

(*h*) Corresponding to Articles 2 and 7 of the Washington Regulations. As to steamships under sail, see *ib.*, art. 14.

(*i*) In the Regulations of 1880 this article began:—"Sea-going steamships, when," &c.

(*k*) The words from (a) were not in Art. 3 of the Rules of 1863, which began "at the fore-mast head"; see *The Telegraph*, 8 Moo. P. C. C. 167; 1 Sp. E. & A. 427, 432. The alteration removes a difficulty in the case of vessels having no distinguishable masthead.

(*l*) In the Rules of 1863 these words were "so constructed."

Art. 3. *an uniform unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.*

(d) *The said green and red side lights shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.*

This Article corresponds with Art. 3 of the Regulations of 1863. It differs, as noted above, from that Article merely verbally. It is identical with Art. 3 of the Regulations of 1880. Coloured side lights were first required for steamships only by the Admiralty Rules of 1st May, 1852, made under the powers of 14 & 15 Vict. c. 79. In 1858 they were first required to be carried by sailing ships.

For British steam trawlers special lights are provided by Art. 10, below, as modified by the Order in Council of Dec. 30, 1884.

"Under way." Every ship not actually brought up is "under way" within the meaning of this Article (*m*). She is under way, though not making any way through the water (*n*), if her anchor is not down. A ship getting her anchor is "under way" so soon as she ceases to be holden by and under the control of her anchor (*o*). A steam tug lying-to under canvas with her fires banked up has been held to be under way (*p*); and a sailing-ship hove-to (*q*).

(*m*) Notwithstanding the terms of Art. 6, which suggest that a ship in tow is not "under way." The definition of under way in the Washington Regulations is "when she (the vessel) is not at anchor or made fast to the shore or aground." These regulations authorize vessels to carry range lights.

(*n*) Cf. paragraph (c) of Art. 5.

(*o*) *The Esk* and *The Gitana*, L. R. 2 A. & E. 350. As to trawlers at work, and ships hove-to, see Arts. 6 and 10.

(*p*) *The Jennie S. Barker*, 3 Asp. Mar. Law Cas. 42; and it has been so held in America. *The Sunnyside*,

(*q*) *The Pennsylvania*, 3 Mar. Law Cas. 977; 19 Wall. 125; *The City of London*, Swab. 248; and see *The James*, Swab. 55; *The Rosalie*, 5 P. D. 245; *infra*, p. 415.

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Ship dredging.

It seems to have been held by Dr. Lushington that a ship dropping or dredging with her anchor stern foremost with the tide was not required to carry side-lights (*r*). But such a vessel would seem to be "under way" within the meaning of Art. 3, and, it is submitted, that Article requires her to carry side lights (*s*). A Thames sailing barge with her mast lowered, dropping with the tide stern foremost through the bridges, and assisted by her anchor ahead, was held not to be a "sailing vessel under way" within the meaning of the Thames rules (*t*). Under a former Act it was held that a vessel driving about the sea in an unmanageable state was "under way," and required to carry her side lights (*u*). Such a case is now provided for by Art. 5.

Lights of a steamship in tow.

The Regulations contain no special provision as to the lights to be carried by a steamship when in tow of another vessel (*v*). In a case where a steamship, with her engines broken down, while in tow carried her usual side lights, and no mast-head light, it does not appear to have been suggested that she was carrying improper lights (*x*).

The Regulations as to the fitting of ships' lights must be exactly observed.

There is some doubt whether a bright light carried elsewhere than in the position described in Art. 3 is in accordance with the law, although the light is visible in the required directions, and is in other respects sufficient (*y*). The side lights must be so fixed that their range is such as is described in the Article. If they are liable to be

1 Otto, 208. See, however, *The Helvetia*, 3 Asp. Mar. Law Cas. 43 (note), where it seems to have been held that the tug was not under way; but the facts are not clear, and the case was not followed in *The Jennie S. Barker*. See *The Byron*, *infra*, p. 415. By the Washington Regulations, a steam vessel under sail is to carry a black shape. (Art. 14.)

(*r*) See *The Smyrna*, mentioned by Dr. Deane, arguendo in *The George Arkle*, Lush. 382, 385, as to the meaning of "under way"; see also Art. 6.

(*s*) It was so held by the Court of Appeal in *The Hollandia* and *The John Ormston*, 15 June, 1885.

(*t*) *The Indian Chief*, 14 P. D. 24.

(*u*) *The George Arkle*, *ubi supra*, decided under 17 & 18 Vict. c. 104.

(*v*) But see Art. 5, Wash. Regs.

(*x*) *The American* and *The Syria*, L. R. 4 A. & E. 226; on app. L. R. 6 P. C. 127.

(*y*) Upon the Regulations of 1863, the law officers of the Crown advised that it was not; see Parl. Pap. No. 53 of 1874.

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unnecessarily obscured by the sails, rigging, or other part of the ship, it would be held that the Regulations are not complied with (*s*).

Board of Trade instructions as to ships' lights.

Minute instructions are issued by the Board of Trade to their surveyors with regard to the fixing and construction of ships' lights. These instructions have not the force of law, so that a ship should be held in fault for a collision merely because her lights are not fitted in accordance with them (*a*).

A ship whose side lights were fixed on the top of a galley, or deck house, seven feet high and six feet broad, so that each light was seven feet inboard from the ship's side, was held not to be in fault, the lights being properly screened and visible in the required directions (*b*).

Slight infringement of the Regulations may be immaterial.

Although the requirements of Art. 3 are not exactly complied with, the ship guilty of the infringement will not be held to be in fault for a collision that could not possibly have been caused by the infringement of the law. In *The Fanny M. Carvill* (*c*) it was held that the lights of the other ship not having in fact been seen across her bow, she was not in fault for the collision. And in *The Duke of Sutherland* (*d*) one of two ships in collision was held not to be in fault, although her side lights were partially obscured by the cat-head, the obscuration not being such

(*s*) *The Tirzah*, 4 P. D. 33; *The Magnet; The Duke of Sutherland; The Fanny M. Carvill*, L. R. 4 A. & E. 417; *The Fanny M. Carvill* (on app.), 2 Asp. Mar. Law Cas. 565; *The Duke of Buccleugh*, 15 P. D. 86.

(*a*) *The Magnet; The Duke of Sutherland; The Fanny M. Carvill, ubi supra.* See also observations of Dr. Lushington in *The Samphire* v. *The Fanny Beck*, Holt, 193, as to the value of the opinion of the Board of Trade upon ships' lights.

(*b*) *The City of Carlisle*, 2 Mar. Law Cas. O. S. 91.

(*c*) L. R. 4 A. & E. 417; on app. 2 Asp. Mar. Law Cas. 565. In *The Emperor* and *The Lady of the Lake*, Holt, 37, Lord Chelmsford said that the Regulations are satisfied only by a "close and literal adherence to what they prescribe." But see *The Fire Queen*, *supra*, p. 54.

(*d*) L. R. 4 A. & E. 417. *The Duke of Buccleugh*, 15 P. D. 86, was a similar case, the obscuration being by the foot of the fore sail, but the positions of the ships being such that it could not have affected the collision. Cp. *The Hermod*, 62 L. T. N. S. 670.

as would have prevented the other from seeing the former in time to avoid her if she had exercised proper skill. Again, in *The Chusan* (*e*), a trawler carrying a bright mast-head light in addition to side lights was held free from blame for collision with a steamer, on the ground that those on board the steamer not having seen the bright light, it could not possibly have contributed to the collision.

Previous to the enactment of 36 & 37 Vict. c. 85, s. 17, a sailing ship was held not to be in fault, even upon the assumption that her side lights were so fixed in the mizen rigging that they were not visible in the directions required by the Regulations, it being proved that the other vessel, a steamship, might, by slackening her speed and using proper care, have avoided her, notwithstanding the suggested insufficiency of her side lights (*f*). And in another case (*g*), where the screens of one ship were only a foot in length, and the side lights could be seen across the bow, it was held that she could recover against the other ship for a collision, it being proved that the lights were not in fact seen across the bow. Under the existing law, however, any infringement of the Regulations as to lights which might by possibility have contributed to the collision, would be held to be negligence contributing to the collision (*h*).

Where the side lights were fixed to the pawl bitts, and the other ship alleged that she could not see them, it was held that the ship so carrying them was in fault for the collision (*i*). A ship having in tow a pilot boat, which carried a mast-head light and no side lights, was held in fault (*k*). So where a steam tug carried her mast-head

(*e*) 5 Asp. M. C. 476.
(*f*) *The Bougainville* v. *The Jas. C. Stevenson*, L. R. 5 P. C. 316.
(*g*) *The Emperor* v. *The Lady of the Lake*, Holt, 37, 202.
(*h*) *The Tirzah*, 4 P. D. 33; *The Dunelm*, 9 P. D. 164; see *supra*, pp. 38, *seq.*
(*i*) *The New Ed* v. *The Gustav*, 1 Mar. Law Cas. O. S. 407.
(*k*) *The Mary Hounsell*, 40 L. T. N. S. 368.

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and side lights in a line, lashed to a bar placed on the top of a cook house on deck, four feet high and five wide, it was held (in Ireland) that they were improperly placed, and that the tug was in fault for a collision which occurred in consequence (*l*).

"Sea-going" steamships.

It is not clear why Art. 3 applies, in terms, to sea-going ships only (*m*). The following Articles as to tugs and sailing ships appear to be applicable to all ships, whether sea-going or not. It would probably be held that it is the duty of every vessel propelled by steam, whether sea-going or not, to carry lights in accordance with the Regulations. In an Irish case it was said by the Court that, the collision having occurred at sea, there could be no question as to the duty of one of the vessels (a tug) to carry the Regulation lights of 1863 (*n*).

It is not clear whether the distance at which the lights are to be visible is stated in statute or nautical miles. In the French Regulations the distance is given as *deux milles*.

The power of ordering inspection of a ship's lights, alleged to be deficient, given to the judge of the Admiralty Court by statute (*o*), was exercised by Sir R. Phillimore in *The Magnet* (*p*). The Trinity Masters having inspected them and found them visible for less than two miles, the ship was held in fault under the statute (*q*).

(*l*) *The Louisa* and *The City of Paris*, Holt, 15.

(*m*) The corresponding Regulation in the American Act of Congress applies to "all steam vessels"; see *The U. S. Grant* and *The Tally Ho*, 7 Bened. 195.

(*n*) *The Louisa* and *The City of Paris*, *ubi supra*.

(*o*) 24 Vict. c. 10, s. 18.

(*p*) L. R. 4 A. & E. 417.

(*q*) 36 & 37 Vict. c. 85, s. 17. In *The Duke of Buccleugh*, *ubi supra*, the Trinity Brethren inspected *The Vandalia*, with her sails set and her lights in position, for the purpose of seeing the effect of the former in obscuring the latter.

ARTICLE 4 (*r*).

Art. 4.

Lights for steam-ships towing other ships.

A steam-ship when towing another ship shall, in addition to her side lights, carry two bright white lights in a vertical line, one over the other, not less than three feet apart, so as to distinguish her from other steam-ships. Each of these lights shall be of the same construction and character, and shall be carried in the same position as the white light which other steam-ships are required to carry.

This Article differs verbally only from Art. 4 of the Regulations of 1863, except in the provision as to the distance between the lights, which is new. It is identical with Art. 4 of the Regulations of 1880.

Object of tug's distinguishing lights.

The distinguishing lights required to be carried by a tug are "for the purpose of warning all approaching vessels that she is not in all respects mistress of her movements" (*s*), and to show that she is encumbered. There is no provision in the Regulations as to distinguishing lights for a sailing ship towing another ship, or for a steamship in tow. But see Washington Regs., Art. 5.

ARTICLE 5 (*t*).

Art. 5. (of the Regulations of 1884).

Signals for ships not under command and telegraph ships.

(a) *A ship, whether a steam-ship or a sailing-ship, which from any accident is not under command, shall at night carry, in the same position as the white light which steam-ships are required to carry, and, if a steam-ship, in place of that light, three red lights in globular lanterns, each not less than ten inches in diameter, in a vertical line, one over the other, not less than three feet apart, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles; and shall by day carry in a vertical line,*

(*r*) Corresponding to Art. 3 of the Washington Regulations. This code requires the towing-lights to be not less than six feet apart; where the tow is more than 600 feet in length, a third light is to be carried; and the tug may carry a stern light for the tow to steer by.

(*s*) *The American* and *The Syria*, L. R. 6 P. C. 127, 131.

(*t*) Corresponding to Art. 4 of the Washington Regulations.

Art. 5. *one over the other, not less than three feet apart, in front of but not lower than her fore-mast head, three black balls or shapes, each two feet in diameter.*

(b) *A ship, whether a steam-ship or a sailing-ship, employed in laying or in picking-up a telegraph cable, shall at night carry, in the same position as the white light which steam-ships are required to carry, and, if a steam-ship, in place of that light, three lights in globular lanterns, each not less than ten inches in diameter, in a vertical line over one another, not less than six feet apart; the highest and lowest of these lights shall be red, and the middle light shall be white, and they shall be of such a character that the red lights shall be visible at the same distance as the white light. By day she shall carry in a vertical line, one over the other, not less than six feet apart, in front of but not lower than her fore-mast head, three shapes not less than two feet in diameter, of which the top and bottom shall be globular in shape and red in colour, and the middle one diamond in shape and white.*

(c) *The ships referred to in this Article, when not making any way through the water, shall not carry the side-lights, but when making way shall carry them.*

(d) *The lights and shapes required to be shown by this Article are to be taken by other ships as signals that the ship showing them is not under command, and cannot therefore get out of the way. The signals to be made by ships in distress and requiring assistance are contained in Article 27.*

This Article has, by Orders in Council, been applied to British and to some foreign vessels (see above, p. 340). But its operation is complicated by the Submarine Telegraph Act, 1885, mentioned above (p. 341), which requires ships laying or repairing cables to conform to the Regulations adopted by the powers signatory to the Convention, which is contained in the schedule of the Act. No such Regulations have at the present date (1890) been agreed to. Probably the Article will not come into effec-

Submarine Telegraph Act, 1885.

tive operation until the Washington Conference Regulations have become law. Foreign vessels to which Art. 5 has not been applied, appear to be subject to the corresponding Article (Art. 5) of the Regulations of 1880 (*u*). Art. 5.

By Articles 5 and 6 of the Convention above referred to, no craft are to approach or stay within one nautical mile of a telegraph repairing ship exhibiting the required signals, or of a buoyed cable.

The Regulations of 1863 contained no Article corresponding to this Article (Art. 5) of the Regulations of 1880 and of 1884. Under the existing law it seems that it is necessary for a vessel to be always provided with these globular red lights and signal balls. If she fails to exhibit them when not under command through any accident, and a collision occurs, she will probably be held to have infringed the Regulations; and, coming within the penalty of 36 & 37 Vict. c. 85, s. 17, she will probably be held in fault for the collision.

Not under command.

It is not clear what the effect of the words "through any accident" may be. A ship hove-to through stress of weather, or for any other reason in the ordinary course of navigation, though she cannot be said to be under command, would not, it is submitted, come within the operation of Art. 5.

So, if a vessel is taken aback, or gathers sternway when in stays, she would probably be held not to be "not under command" within the meaning of Art. 5 (*x*).

A ship which from any accident is not under command is required to exhibit her side lights as well as the red light or balls when "not making any way through the water," and not otherwise. "Making way through the water" is here clearly distinguished from the "under way" of Art. 3 and Art. 6, which expression includes

(*u*) For these Regulations see Maude & Pollock on Shipping, 2nd ed. vol. 2, pp. 175—178; Ord. in Council of 14th Aug. 1879.

(*x*) See *The Araby Maid* (Wreck Commissioner), "Times," 16th December, 1880.

Art. 5.

a ship not making way through the water, provided her anchor is not down, and holding (*y*). The object of the direction of Art. 5, that a ship not under command shall carry side lights when making way through the water, appears to be to indicate to other ships the direction of her head, and, approximately, her course. If this be the intention of the Article, it is not clear whether a steamship with her engines disabled, driving rapidly to leeward, and making little or no headway, is required to carry her side lights. It seems that she must carry them, though they are likely to mislead other ships.

of P. Calcutt (1893 A.C. 207)

It will be observed that Art. 5 does not in terms exclude the operation of the "meeting" or "crossing" rules in the case of two ships approaching each other with risk of collision. It is not clear that a vessel carrying the red lights or balls is free from all obligation to comply with the steering and sailing rules, if she is able to do so. The direction to carry side lights when she has way through the water, appears to assume that a ship may be at once "not under command," and able, at least to some extent, to obey her helm.

A vessel parted from her anchors, drove over Cardiff sands in a gale of wind, and injured her rudder so as to become unmanageable. Whilst in this condition she came into collision with a vessel to leeward. It was held that there was no statutory presumption of fault on account of her not carrying the red lights. The importance of this decision is, however, lessened by the findings that the circumstances of the case made a departure from the Regulations necessary; that the collision was in fact inevitable; and further, that the absence of the red lights could not, by possibility, have contributed to it (*z*).

Art. 5 has no application to ships at anchor. Perhaps it would apply to a ship ashore in a fair-way (*a*).

(*y*) See *infra*, p. 378.
(*z*) *The Buckhurst*, 6 P. D. 152.
(*a*) Cf. *The Elizabeth* and *The Adalia*, 3 Mar. Law Cas. O. S. 345; *The Industrie*, L. R. 3 A. & E. 303.

Article 6 (*b*).

Art. 6. Lights for sailing-ships.

A sailing-ship under way, or being towed, shall carry the same lights as are provided by Article 3 *for a steam-ship under way, with the exception of the white light, which she shall never carry.*

This Article is identical with Article 5 of the Regulations of 1863, and Article 6 of the Regulations of 1880.

"Under way": meaning of the term.

There seems to be no doubt that a ship hove-to is under way within the meaning of Article 6. It was so held under the Regulations of 1863 (*c*); and a ship hove-to comes under the steering and sailing rules (*d*); under a former Act there were decisions to the same effect (*e*).

There was doubt whether trawlers at work were under way within the Regulations of 1863 (*f*); it has lately been decided that they were (*g*). This decision is of importance as regards trawlers not coming under Art. 10 (see *infra*, p. 385). It is believed that the practice is for trawlers at work to carry a white light at the mast-head, and no side lights. Art. 10 of the Regulations of 1880 provided that trawlers at work should carry their side lights; but the (supposed) alteration in the law met with opposition on the part of the fishermen, and the operation of the obnoxious Article was for some time suspended by Orders in Council (see *infra*, p. 390).

A vessel coming to an anchor while hauling down her jibs, and having little or no way on her, was carrying her side lights; it appears that she was right in doing so (*h*).

(*b*) Corresponding to Arts. 5 and 7 of the Washington Regulations.

(*c*) *The Pennsylvania*, 3 Mar. Law Cas. O. S. 477; and the Supreme Court of the U. S. came to the same decision upon the same facts: *The Pennsylvania*, 19 Wall. 125.

(*d*) *The Rosalie*, 5 P. D. 245. As to "under way," see above, p. 366.

(*e*) *The City of London*, Swa. 245; *The James*, *ibid.* 55. The words of the Regulation under which these cases were decided are "under sail." See Swab. App. 1, for these rules. The same words, "under sail," occur in the rules made under 17 & 18 Vict. c. 104, s. 295.

(*f*) See *The Robert and Ann* and *The Lloyds*, Holt, 55; *The Edith*, Ir. Rep. 10 Eq. 345; *The Englishman*, 3 P. D. 18.

(*g*) *The Dunelm*, 9 P. D. 164; *infra*, p. 387.

(*h*) *The Adriatic*, 3 Asp. Mar. Law Cas. 16.

Art. 6.

It has been said that where a vessel parted from her anchors and drove over a sand in an unmanageable state, owing to her rudder being disabled, it would have been wrong for her to have exhibited her side lights (*i*).

Article 7 (*j*).

Art. 7. Special lights for small vessels.

Whenever, as in the case of small vessels during bad weather, the green and red side lights cannot be fixed, these lights shall be kept on deck on their respective sides of the vessel, ready for use; and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side, nor the red light on the starboard side. To make the use of these portable lights more certain and easy, the lanterns containing them shall each be painted outside with the colour of the light they respectively contain and shall be provided with proper screens.

This Article is almost identical with Article 6 of the Regulations of 1863, and is the same as Article 7 of the Regulations of 1880.

What vessels may carry their side lights on deck.

It is not easy to see to what vessels the Article has any application. Art. 10 provides for boats, and there are few craft other than boats in which side lights "cannot be fixed" and carried, even in the worst weather, if properly fitted. It was assumed in a case in Ireland that a full decked trawler of 41 tons cannot conveniently work her trawl with side lights fixed, and that such a vessel may carry them on deck, even in fine weather and when not at work (*k*). This can scarcely have been the intention of the framers of Art. 7.

If a vessel seeks to excuse herself for not having her

(*i*) *The Buckhurst*, 6 P. D. 152.
(*j*) Corresponding to Art. 6 of the Washington Regulations.
(*k*) *The Margaret* and *The Tuscar*, Holt, 44.

side lights fixed in their proper place, and to bring herself within Art. 7, the burden is on her to prove that the lights could not with safety be carried fixed. In the case of a brig of 255 tons (*l*), and in another case of a vessel of 239 tons (*m*), the Court appears to have doubted whether it was practicable in bad weather to carry them fixed in the usual places. It is submitted that such vessels would not come within the operation of Art. 7. Art. 7.

Article 8 (*n*).

Art. 8. Riding lights.

A ship, whether a steam-ship or a sailing-ship, when at anchor, shall carry, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a globular (o) lantern of not less than eight inches in diameter, and so constructed as to show a clear uniform and unbroken light visible all round the horizon, at a distance of at least one mile.

This Article corresponds with Art. 7 of the Regulations of 1863. The wording is slightly different, but the only alteration of consequence is that the present Art. 8 applies to ships at anchor anywhere, while the corresponding Article of the former rules applied only to ships brought up in a roadstead or fairway. The Article is identical with Art. 8 of the Regulations of 1880.

In *The Saxonia* (*p*) it was said by Dr. Lushington that, by the general law of the sea a vessel at anchor, or a fishing boat at work, is bound to carry a light so as to enable other vessels, whose duty it is to avoid her, to have the opportunity of doing so. But there were decisions that

(*l*) *The Livingstone*, Swab. Adm. 519; see also *The Calla*, *ibid.* 465.

(*m*) *The Tirzah*, 4 P. D. 33.

(*n*) Corresponding to Art. 11 of the Washington Regulations. This code requires vessels of 150 feet and upwards in length to carry a second riding light astern; and vessels aground in a fairway to show two red lights above the riding light.

(*o*) In Canada it has been held that "globular" is not essential: *The General Birch*, 6 Quebec L. R. 300.

(*p*) Lush. 410.

Art. 8.

by the maritime law a ship under way is not always bound to carry a light (*i*). A riding light was first required by law in the year 1852 (*k*).

"At anchor": meaning of the phrase.

As observed elsewhere (*l*), "at anchor" is opposed to "under way." There is no express decision upon the point, but it is submitted that every vessel fast to an object which is itself fast to the ground is "at anchor," and is required to exhibit the white light. Thus, a vessel riding to a buoy, or alongside another vessel, or moored alongside a quay, or fast to a dolphin, or any other object on the shore, or a fishing boat with her killick on the ground, would, it seems, all be "at anchor" within the meaning of Art. 8. A ship dropping or dredging stern foremost with her anchor atrip is not at anchor within the meaning of the Article (*m*).

Riding light must not be obscured.

A riding light should not be placed where it is obscured in any direction by masts, spars, sails, or rigging. The forestay is a usual, and probably the best, place for a riding light in an open roadstead or river. The fore-shrouds is not so good a place (*n*). Care must be taken that sails and other gear likely to obscure the light are stowed. A schooner has been held in fault, under 36 & 37 Vict. c. 85, s. 17, because her main-sail was scandalised, instead of being stowed, and would obscure her riding light to a vessel astern (*o*).

Sheering about.

It is assumed that vessels at anchor are stationary (*p*), or nearly so; ships, therefore, when at anchor, must not be allowed to sheer about unnecessarily. A vessel ashore in a situation where other ships may run into her, although probably she does not come within the terms of Art. 8,

(*i*) See *supra*, p. 360, note (*r*).

(*k*) Under the Admiralty Rules of that date, made under 17 & 18 Vict. c. 79.

(*l*) See *supra*, p. 366.

(*m*) See *The Indian Chief*, 14 P. D. 24, for a decision to this effect under the Thames Rules (*infra*, p. 575.)

(*n*) *The Para*, Ad. Div. 4th March, 1886.

(*o*) *The Tbilka*, Ad. Div. 14th Dec. 1886.

(*p*) *The Esk* and *The Gitana*, L. R. 2 A. & E. 350.

is required to exhibit a light to warn other ships of her position (*q*). Art. 8.

In America, it has been held that a ship moored to a wharf out of the regular track of ships is not required to exhibit a light (*r*). But a tug moored to a boom anchored in a fair-way was held in fault for having no riding light up (*s*). Ship moored to a wharf.

As to special riding lights for ships in the Mersey, the Humber, dredgers in the Thames, and ships moored in the Suez Canal, see the Appendix, below. Special riding lights.

In the Elbe, a second riding light is often carried astern. In several of the rivers and harbours of Canada, vessels are required to show riding lights at a specified height; *e.g.*, St. John River, Bridgwater, Hillborough, North Sydney, Gaspé, Nanaimo, Arichat.

Fishing vessels and open boats when at anchor are required by Art. 10 (*infra*, p. 380) to exhibit a white light, visible at least one mile.

Article 9 (*t*).

A pilot vessel, when engaged on her station on pilotage duty, shall not carry the lights required for other vessels, but shall carry a white light at the mast-head, visible all round the horizon, and shall also exhibit a flare-up light, or flare-up lights, at short intervals, which shall never exceed fifteen minutes. A pilot vessel, when not engaged on her station on pilotage duty, shall carry lights similar to those of other ships. Art. 9. Lights for pilot vessels.

This Article is identical with Art. 9 of the Regulations of 1880. There are considerable differences between it and the corresponding Article 8 of the Regulations of 1863. Under these Regulations, questions frequently

(*q*) *The Industrie*, L. R. 3 A. & E. 303; *Kidson* v. *McArthur*, 5 Sess. Cas. 4th series, 936.

(*r*) *Culbertson* v. *Shaw*, 18 How. 584; *The Granite State*, 3 Wall. 310.

(*s*) *The Willard Saulsbury*, cited 1 Pars. on Ship. ed. 1869, 564.

(*t*) Washington Regs., Art. 8.

Art. 9.

arose as to the proper lights to be carried by pilot boats, when not serving vessels (*t*). The present Regulations will apply to steam, as well as sailing, pilot boats, should steam pilot boats be introduced. It has been held that a pilot boat in tow of another ship must not carry her mast-head light (*u*). A boat with pilots on board, and serving ships, would seem to be a pilot vessel within the scope of Art. 9, whether the pilots were licensed pilots or not (*u*).

It is submitted that a pilot vessel is on her station on pilotage duty within the meaning of this Article, and required to carry the white mast-head light alone, not only whilst actually engaged in putting a pilot on board a ship, but whilst she is cruising on her station either for the purpose of supplying pilots or taking them out of ships (*x*).

It has been held in America that a vessel running down a pilot boat from which she was taking a pilot was in fault, although the pilot boat was not carrying her proper light (*y*).

Article 10 (*z*).

Art. 10.

Open boats and fishing vessels of less than twenty tons net registered tonnage, when under way, and when not having their nets, trawls, dredges, or lines in the water, shall not be obliged to carry the coloured side lights; but every such boat and vessel shall, in lieu thereof, have ready at hand a lantern with a green glass on the one side and a red glass on the other side, and on approaching to or being approached by another vessel, such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side nor the red light on the starboard side.

(*t*) *The Wanata*, 4 Bened. 310; 5 Otto, 600; *The Edinburgh*, before the Wreck Commissioner, March, 1879.

(*u*) *The Mary Hounsell*, 4 P. D. 204; 40 L. T. N. S. 368.

(*x*) This, however, appears not to be the practice in the Hooghly, where the pilot brigs, it is stated, always carry their side lights, and obscure them only whilst hove-to for the purpose of putting out a pilot.

(*y*) *The City of Washington*, 2 Otto, 31.

(*z*) Corresponding to Art. 9 of the Washington Regulations, which, however, differs from it materially.

Art. 10.

The following portion of this Article applies only to fishing vessels and boats when in the sea off the coast of Europe lying north of Cape Finisterre:—

(a) *All fishing vessels and fishing boats of twenty tons net registered tonnage or upwards, when under way and when not required by the following Regulations in this Article to carry and show the lights therein named, shall carry and show the same lights as other vessels under way.*

(b) *All vessels when engaged in fishing with drift nets shall exhibit two white lights from any part of the vessel where they can be best seen. Such lights shall be placed so that the vertical distance between them shall be not less than six feet and not more than ten feet; and so that the horizontal distance between them, measured in a line with the keel of the vessel, shall be not less than five feet and not more than ten feet. The lower of these two lights shall be the more forward, and both of them shall be of such a character, and contained in lanterns of such construction, as to show all round the horizon, on a dark night with a clear atmosphere, for a distance of not less than three miles.*

(c) *A vessel employed in line fishing with her lines out shall carry the same lights as a vessel when engaged in fishing with drift nets.*

(d) *If a vessel when fishing becomes stationary in consequence of her gear getting fast to a rock or other obstruction, she shall show the light and make the fog signal for a vessel at anchor.*

(e) *Fishing vessels and open boats may at any time use a flare-up in addition to the lights which they are by this Article required to carry and show. All flare-up lights exhibited by a vessel when trawling, dredging, or fishing with any kind of drag net, shall be shown in the after part of the vessel, excepting that, if the vessel is hanging by the stern to her trawl, dredge, or drag net, they shall be exhibited from the bow.*

(f) *Every fishing vessel and every open boat when at anchor*

Art. 10. *between sunset and sunrise shall exhibit a white light visible all round the horizon at a distance of at least one mile.*

(g) *In fog, mist, or falling snow, a drift net vessel attached to her nets, and a vessel when trawling, dredging, or fishing with any kind of drag net, and a vessel employed in line fishing with her lines out, shall at intervals of not more than two minutes make a blast with her fog horn, and ring her bell alternately.*

An Order in Council of 30th December, 1884, modifies and adds to this Article, as regards British fishing craft in the seas of the coasts of Europe north of Cape Finisterre. After reciting the powers to modify the Regulations given by 25 & 26 Vict. c. 63, and the above Articles 3, 6, and 10, the Order proceeds as follows:—

As regards steam vessels engaged in trawling when under steam, such vessels, if of twenty tons gross register tonnage or upwards, and having their trawls in the water, and not being stationary in consequence of their gear getting fast to a rock or other obstruction, shall between sunset and sunrise either carry and show the lights required by the said recited Article 3 *of the Regulations aforesaid, or shall carry and show in lieu thereof and in substitution therefor, but not in addition thereto, other lights of the description set forth in Part I. of the Schedule hereto.*

As regards sailing vessels engaged in trawling, such vessels, if of twenty tons net register tonnage or upwards, and having their trawls in the water, and not being stationary in consequence of their gear getting fast to a rock or other obstruction, shall between sunset and sunrise either carry and show the lights required by the said recited Article 6 *of the Regulations aforesaid, or shall carry and show in lieu thereof, and in substitution therefor, but not in addition thereto, other lights of the description set forth in Part II. of the Schedule hereto.*

The red and green lights, which are by this Order permitted as aforesaid to be carried in lieu of the lights required by

Article 3 *and Article* 6 *of the said recited Regulations respectively, shall be of such a character as to be visible at a distance of not less than two miles on a dark night with a clear atmosphere.* Art. 10.

And her Majesty is pleased further to direct that steam vessels of twenty tons gross register tonnage or upwards, and sailing vessels of twenty tons net register tonnage or upwards, engaged in trawling, when under way between sunset and sunrise, but not having their trawls in the water, shall, if steamships, carry and show the lights required by Article 3 *above recited, and, if sailing-ships, shall carry and show the lights required by Article* 6 *above recited. Provided, however, that the modifications and additions set forth in Parts I., II., of the Schedule hereto shall not be applicable to the fishing vessels and boats of any foreign country, unless and until the same shall have been made applicable thereto by Order in Council.*

SCHEDULE.

PART I.—*Steam Vessels.*

(1) *On or in front of the fore-mast head, and in the same position as the white light which other steam-ships are required to carry, a lanthorn* showing a white light ahead, a green light on the starboard side, and a red light on the port side. Such lanthorn shall be so constructed, fitted, and arranged, as to show an uniform and unbroken white light over an arc of the horizon of four points of the compass, and an uniform and unbroken green light over an arc of the horizon of ten points of the compass, and an uniform and unbroken red light over an arc of the horizon of ten points of the compass; and it shall be so fixed as to show the white light from right ahead to two points on the bow on each side of the ship, the green light from two points on the starboard bow*

* *Sic.*

Art. 10. *to four points abaft the beam on the starboard side, and the red light from two points on the port bow to four points abaft the beam on the port side; and* (2) *a white light in a globular lanthorn of not less than eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light all round the horizon; the lanthorn containing such white light shall be carried lower than the lanthorn showing the green, white, and red lights as aforesaid, so, however, that the vertical distance between them shall not be less than six feet nor more than twelve feet.*

PART II.—*Sailing Vessels.*

(1) *On or in front of the fore-mast head, a lanthorn having a green glass on the starboard side and a red glass on the port side, so constructed, fitted, and arranged that the red and green do not converge, and so as to show an uniform and unbroken green light over an arc of the horizon of twelve points of the compass, and an uniform and unbroken red light over an arc of the horizon of twelve points of the compass, and it shall be so fixed as to show the green light from right ahead to four points abaft the beam on the starboard side, and the red light from right ahead to four points abaft the beam on the port side; and* (2) *a white light in a globular lanthorn of not less than eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light all round the horizon. The lanthorn containing such white light shall be carried lower than the lanthorn showing the said green and red lights as aforesaid, so, however, that the vertical distance between them shall not be less than six feet and not more than twelve feet.*

A further modification of Art. 10 was made by Order in Council of 24th June, 1885. By it British sailing trawlers, in the seas north of Finisterre, when fishing and not stationary, were authorized, instead of the lights mentioned in Art. 6 of the Regulations of 1884, and in the

Order in Council of 30th December, 1884, to carry and show: Art. 10.

A white light in a globular lanthorn of not less than eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light all round the horizon, and visible on a dark night with a clear atmosphere for a distance of at least two miles; and also a sufficient supply of red pyrotechnic lights which shall each burn for at least thirty seconds, and shall, when so burning, be visible for the same distance under the same conditions as the white light. The white light shall be shown from sunset to sunrise, and one of the red pyrotechnic lights shall be shown on approaching, or on being approached by another ship or vessel in sufficient time to prevent collision.

It will be observed that Art. 10 of the Regulations of 1884 relates only to fishing vessels in certain waters; and the addition made by the Order in Council of 30th December, 1884, only to British craft (*a*). The law as to other craft, and to all fishing craft in other waters, is in an unsatisfactory state. To ascertain what are the proper lights for a fisherman to whom Art. 10 does not apply, it is necessary to examine the following Acts of Parliament and Orders in Council:—6 & 7 Vict. c. 79; 25 & 26 Vict. c. 63; 31 & 32 Vict. c. 45; 38 Vict. c. 15; 40 & 41 Vict. c. 42; 46 & 47 Vict. c. 22; Orders in Council of the following dates: 9th January, 1863; 6th January, 1869; 14th August, 1879; 24th March, 1880; 26th August, 1881; 18th August, 1882; 23rd August, 1883; 2nd February, 1884; and a notice pursuant to 46 & 47 Vict. c. 22, s. 29, and dated 26th March, 1884, and gazetted

(*a*) The Regulations of 1884 have been applied only to British ships, and the ships of certain foreign countries (see above, p. 340). The fishing craft of those countries to which they have not been applied are still subject to Art. 10 of the Regulations of 1880, which requires altogether different lights. The Regulations of 1880 will be found in Maude & Pollock, 2nd ed. vol. 2, p. 175 *seq.*, and in Ord. in Council of 14th August, 1879. Art. 10 does not apply to Danish fishing craft: Ord. in C. 17th Nov. 1888.

Art. 10.

28th March, 1884, that the Sea Fisheries Act, 1883, is to come into force on the 15th May, 1884. It is probably intended eventually to apply Art. 10 to all foreign fishermen. It is to be hoped that this will be done, or that the law with regard to fishermen's lights will be reduced to a more satisfactory state than it is in at present. The existing law, which provides different lights for fishing craft of different countries, many of which fish in the same waters, must lead to difficulties, both at sea and in the law courts. The Orders in Council of 30th December, 1884, which enable British craft to carry lights different from all other countries, and that of 17th November, 1888, which excepts Danish fishing craft from the operation of Art. 10, aggravate these difficulties.

There is a difficulty with regard to the lights of French fishing boats off the coasts of France north of Cape Gris Nez. By the Regulations of 1884, applied to French craft by Order in Council of 9th September, 1884, and by 46 & 47 Vict. c. 22, s. 6, and Art. 24 of the First Schedule to that Act, they are required to carry the lights specified in Art. 10 of the Regulations of 1884. By 46 & 47 Vict. c. 22, s. 24, re-enacting 6 & 7 Vict. c. 79, Sched. 1, Art. 53, they are required, in the waters above mentioned, to carry the lights specified in the last-mentioned Act. The two enactments are inconsistent, and it remains to be decided which is applicable at the present day.

The Sea Fisheries Act, 1883 (*b*), above mentioned, gives certain powers to sea fishery officers with reference to the inspection of the lights of British fishing boats in the North Sea, as defined by that Act, similar to those given to surveyors by the Merchant Shipping Acts (*c*).

Art. 24 of the First Schedule to 46 & 47 Vict. c. 22, requires the boats of the nations who are parties to the

(*b*) This Act came into force on the 15th May, 1884: see London Gazette, 28th May, 1884.

(*c*) See 46 & 47 Vict. c. 93, ss. 6, 12; 25 & 26 Vict. c. 63, s. 30.

Convention scheduled to the Act, namely, Great Britain, Germany, Belgium, Denmark, France, the Netherlands (*d*), to conform to the Regulations as to lights made under 25 & 26 Vict. c. 63, and for the time being agreed to by the parties to the Convention (*e*). Art. 10.

Before the enactment of the Regulations of 1884 there was some difficulty in determining whether a trawler at work was required to carry the mast-head light mentioned in Art. 9 of the Regulations of 1863, or the side lights of Arts. 4 and 6 of the Regulations of 1880 (*f*). The question was much discussed in *The Dunelm*, a case which, though decided before the Regulations of 1884 came into force, is still of importance.

In *The Dunelm* (*g*), it was held that a paddle-wheel steamship (*h*) with her trawl down, going two-and-a-half knots through the water, and four-and-a-half over the ground, was in fault for a collision with a steamship because she had no side lights exhibited (*i*). She was carrying at her mast-head a bright light in a globular lantern. The collision occurred on the 24th of March, 1884, at which date Art. 10 of the Regulations of 1880 was in suspense, Art. 9 of the Regulations of 1863 having, by Order in Council of February, 1884, been substituted "in lieu thereof and in substitution therefor." The effect of the Order in Council, and the construction of Art. 9 (of 1863) were much discussed. Butt, J, held that Art. 9 applied only to "vessels which are either stationary, as a vessel at anchor would be, or at all events, if we are to depart from this, at the utmost to vessels drifting without *The Dunelm.*

(*d*) As to Norway and Sweden, see additional article to the Schedule.

(*e*) This appears to be the effect of Art. 24 of the Convention; but the wording is not clear.

(*f*) See *The Robert* and *The Ann*, Holt, 55; *The Englishman*, 3 P. D. 18; *The Edith*, Ir. Rep. 10 Eq. 345; *The Dunelm*, 9 P. D. 104.

(*g*) 9 P. D. 164.

(*h*) Probably a Tyne tug, or vessel of that class.

(*i*) Under 36 & 37 Vict. c. 85, s. 17.

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way through the water." The Court of Appeal (Brett, M.R., Bowen, and Fry, L.JJ.) affirmed the decision of the Court below, that the trawler should have carried side lights, but held that the term "stationary" in Art. 9, as applied to a trawler, described a vessel not absolutely without motion over the ground or through the water, but a vessel going just as fast as is necessary to keep herself under command.

The Chusan: The Warwick.

The decision in *The Dunelm* was followed by the promulgation of the Regulations of August 11th, 1884. Under those Regulations, Butt, J., in *The Chusan* (*k*), held, though with some doubt, sailing smacks, "when trawling, *i.e.*, when moving through the water with their trawls down, are bound by Art. 10 (a) to carry the side lights that ordinary sailing vessels carry." The collision in that case occurred before the Orders in Council of Dec. 30th, 1884, and June 24th, 1885. Since those orders came into effect, a sailing smack which in clear weather showed a bright light, and burned red flares after she had become stationary by getting fast to some obstruction, was held in fault under Art. 10 (d) for not making the fog signal for a vessel at anchor (*l*).

The Tweedsdale.

From *The Tweedsdale* (*m*), recently before Butt, J., it appears that a steam-trawler fishing is not at liberty to carry which lights she pleases—the ordinary steamships' lights of Art. 3, or the steam-trawlers' lights of the Order in Council of 30th Dec. 1884. She has an option, but the option "must be exercised with discretion, and I think the discretion given must be used in this sense. If a trawler has not only sufficient way on her to keep herself in command, but also sufficient way to act with effect in altering her course for an approaching ship, then what I may call the ordinary Regulation side lights, that is, the lights prescribed by Art. 3, should be carried, and those in charge of her should act as the Regulations require an

(*k*) 5 Asp. 476.
(*l*) *The Warwick*, 15 P. D. 189.
(*m*) 14 P. D. 164.

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unencumbered vessel to act. If the trawler has no more than just steerage way, and has little power therefore of keeping out of the way of another vessel, she should carry what I call the extraordinary Regulation lights, namely, the lights prescribed in the schedule (to the Order in Council of 30th Dec. 1884). . . . She should refrain from making any alteration of her course and leave the other vessel to keep clear of her" (*n*).

In this case *The City of Gloucester*, steam-trawler, was held free from fault for a collision with the four-masted barque *Tweedsdale*. The trawler was carrying on her mast the two steam-trawlers' lights described in the Order in Council of 30th Dec. 1884, and did not alter her course up to the collision. The construction placed upon the Order in Council by the learned judge, as he remarks, throws a serious responsibility upon persons in charge of trawlers, namely, that of deciding whether their way is sufficient to require them to carry side lights or not. Practically, the question must generally be decided in favour of the mast lights and against side lights, for the fishing is carried on more by the tide than by the ship's head-way, and the trawl warp and gear have at least as powerful an effect upon the ship's course as has the rudder, even in a fresh breeze. It was probably intended by the framers of the Order in Council not to compel steam-trawlers to carry the lights of Art. 3 or those of the Order in Council according to circumstances, but to give them the liberty of carrying which lights they preferred.

As regards British and French (*o*) trawlers in the North Sea, the English Channel, and elsewhere "in the sea off the coasts of Europe lying north of Cape Finisterre," the law is now clear (*p*). Art. 10 of the Regulations of 1884

(*n*) *Per* Butt, J., 14 P. D. p. 171.

(*o*) The case is the same as regards fishing craft of all other countries to which the Regulations of 1884 are applied.

(*p*) 46 & 47 Vict. c. 22, s. 24, keeping in force the Schedule to 6 & 7 Vict. c. 79, which included a provision as to the lights of drift-

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provides, paragraph (a), that when under way, whether fishing or not, they shall carry their side lights. As regards British and French trawlers elsewhere, and all other trawlers to which the Regulations of 1884 do not apply, Art. 10 of the Regulations of 1880 (*q*) is explicit; they must carry the red and green lights on the mast as mentioned in that Article, and they must carry their side lights besides.

It is believed that the almost universal practice of trawlers, when fishing, is, and always has been, to carry a white light at the cross-trees or mast-head, and that fishermen have a strong objection to carry any other lights. Indeed, Art. 10 of the Regulations of 1880 was suspended on the express ground that the lights provided by it for trawlers were considered by the fishermen to be dangerous for the fishing boats and misleading to other vessels. In a recent case (*r*) it was proved that the white light, and no side lights, was carried whilst the trawl was on the rail. It remains to be seen whether the specific enactments of the Regulations of 1880 and 1884 will be followed by any change in the practice of fishermen. The decision in *The Dunelm* shows that, if they persist in carrying the white light at the mast-head or cross-trees, and a collision occurs, they will almost inevitably be held in fault (*s*).

From *The Dunelm* (*t*) it is clear that a steam trawler, and it would seem also any steamship fishing with a trawl, is a trawler or fishing vessel.

The Regulations of 1884, except as regards the red,

net boats, outside the exclusive fishery limits of the British islands, as defined by sect. 28 of the Act of 1883, is no longer in force: see 46 & 47 Vict. c. 22, s. 30 (*e*).

(*q*) This Article, which was suspended until 1st Sept. 1884, is now in force for all trawlers not provided for by Art. 10 of the Regulations of 1884.

(*r*) *The Lady Elizabeth* and *The Premier*, Wreck Enquiry, 3rd Dec. 1885.

(*s*) The existing law, which requires a trawler to carry lights intended to show to another ship the direction in which the trawler is approaching, is a mistake, and, if obeyed, will lead to collision. A trawler's head never points in the direction in which she is moving, and is often nearly at right angles to it.

(*t*) 9 P. D. 164.

white and green lights authorized by the Order in Council of 30th December, 1884, have not altered the law with regard to the lights of British and French trawlers in the seas north of Cape Finisterre. Now, as formerly, they are required to carry the ordinary side lights, and no bright light aloft. The law on the subject has been strangely misunderstood or neglected. Art. 10.

Article 11 (*u*).

A ship which is being overtaken by another shall show from her stern to such last-mentioned ship a white light or a flare-up light. Art. 11.

Light for overtaken ship.

This Article is identical with Art. 11 of the Regulations of 1880. The Regulations of 1863 contained no provision as to an overtaken ship showing a stern light. It was, however, held, under the Regulations of 1863, that the duty of a ship being overtaken at night by another coming in such a direction that the side lights of the overtaken ship were not visible to her, and so that there was risk of collision, was, to keep the overtaking ship's lights in view, and, if necessary, to warn her of the danger by showing a light over the stern (*x*).

Though no risk of collision.

It will be observed that the application of Art. 11 is not in terms limited, as are the steering and sailing rules, to cases where there is risk of collision. It applies where the ship astern is broad on the quarter, and is broadening, so long as she is overtaking the ship ahead. And it is not necessary that she should be upon a course such that there is, or will be, risk of collision (*y*).

(*u*) Corresponding to Art. 10 of the Washington Regulations, *infra*.

(*x*) *The City of Brooklyn*, 1 P. D. 276; 3 Asp. 230; *The Anglo-Indian*, 3 Asp. 1; *The Hannah Park* v. *The Lena*, 2 Mar. L. C. O. S. 345; *The John Fenwick*, L. R. 3 A. & E. 500; *The Earl Spencer*, L. R. 4 A. & E. 431; *contra*, *The Cybele*, 5 Quebec, L. R. 262. But see Art. 10 (of the Regulations of 1880), e, *supra*, p. 381.

(*y*) *The Main*, 11 P. D. 132.

Art. 11.

The duty to exhibit the stern light "does not arise till the vessel which is being overtaken has had an opportunity of seeing that the vessel which is overtaking her is a vessel coming nearer to her, and that she is approaching upon such a course that she cannot see the lights of the overtaken ship. When the overtaking ship is seen to be thus approaching, then the duty arises to give the specified warning within a reasonable time, to afford an opportunity to the other vessel to keep out of the way"(*z*).

It was held, in an early case (*a*) under this Article, that, after risk of collision had apparently ceased, the obligation to exhibit the stern light also ceased. But this decision was overruled in *The Main* (*ubi supra*). The stern light must be shown so long as the ship from which it is shown is being overtaken (*b*).

What is an overtaken ship?

The question arises under this Article, as under Arts. 16 and 20, When is a ship "being overtaken by" another? The Regulations contain no definition of the term, and the decisions upon the point are not conclusive (*c*). It is difficult to draw the line between crossing and overtaking vessels; but, as a general rule, it may be assumed that Art. 11 does not apply so long as the side lights of the vessel in question are visible to the other; in other words, it applies only when the other ship is coming up from more than two points abaft the beam on either side. "A vessel approaching another from aft, and being more than two points abaft the beam of the foremost ship . . . is an overtaking vessel within the meaning of Art. 11; and a vessel is not an overtaking vessel within the meaning of

(*z*) *Per* Lord Herschell, *The Main*, 11 P. D. 132, 136.

(*a*) *The Reiher*, 4 Asp. M. L. C. 478. A smack hove-to observed the three lights of a steam-ship coming up with her astern. She showed her stern light until the steamship shut in her green, and then she ceased to show the light. The steamship then altered her helm again and ran into the smack. It was held (wrongly) that the smack, having exhibited her light until risk of collision was apparently determined, had complied with Art. 11, and was free from blame.

(*b*) See *per* Hannen, P., *The Essequibo*, 13 P. D. 51, 53.

(*c*) See *infra*, pp. 426, 462.

this Article unless she is more than two points abaft the beam of that other" (*d*). But until a satisfactory definition of a crossing ship is arrived at, the question cannot be considered as settled. If the rule suggested above as to the application of Art. 11 is correct, and it should be held, as to Art. 16, that a vessel coming up with another from three or four points abaft the starboard beam of the latter is a crossing ship within the meaning of Art. 16, the result follows, that it is the duty of the former both to exhibit the stern light under Art. 11, and to keep out of the way under Art. 16. Art. 11.

A smack hove-to is "being overtaken" by another coming up with her astern, and is required to show the stern light (*e*). It would seem that to be an "overtaken" ship within the meaning of Art. 11, the ship must be under way, and that a vessel at anchor is not required to show the stern light. The question will arise whether a sailing ship beating to windward across the bows of a steamship, with her red light visible to the steamship, is being overtaken by the steamship when she puts her helm down to go about.

Art. 11 imposes upon those in charge of a ship the duty of keeping a look-out astern. Under the Regulations of 1863, which, as stated above, contained no express direction as to showing a stern light, it appears to have been held that a ship was not necessarily in fault because she did not see and warn an overtaking ship (*f*). Under the existing Regulations a ship would probably be held in fault, under 36 & 37 Vict. c. 85, s. 17, if she were struck by an overtaking ship to which she had not shown a stern light, when she might have shown it (*g*). Look-out astern.

Art. 11 does not require the stern light to be fixed (*h*), and it would seem to be improper to carry it fixed and Fixed stern-light.

(*d*) *Per* Butt, J., *The Imbro*, 14 P. D. 73, 77; see also *The Main*, *ubi supra*.

(*e*) *The Reiher*, 4 Asp. Mar. Law Cas. 478.

(*f*) See *The Hannah Park* and *The Lena*, 2 Mar. L. C. O. S. 345.

(*g*) *The Main*, 11 P. D. 132; *The Imbro*, 14 P. D. 73.

(*h*) See *The Breadalbane*, 7 P. D. 186; *The Pacific*, 9 P. D. 124.

Art. 11.

showing continuously (*i*). If a lantern is used, the Article will be complied with if it is carried on deck in a box or bucket, and exhibited as occasion requires. It is a common practice in the Thames and elsewhere to carry the stern light fixed. In the Mersey the local rules require it to be so carried (*j*).

In *The Imbro* (*k*) Butt, J., held that Art. 11 does not authorize the carrying of the stern light when there is no overtaking vessel in sight; and Hannen, P., in *The Essequibo* (*l*), said that the light should be shown "from time to time" to the other ship.

To carry the stern light in such a way that its rays show forward so as to overlap those of the side lights has been held to be an infringement of the Regulations. This was the case in *The Hubbuck* (*m*), where the stern light was a globe lantern on a flagstaff on the taffrail; and in *The Palinurus* (*n*), where the light was hung over the taffrail.

The binnacle light, although visible astern, is not a compliance with Art. 11 (*o*).

In *The Pacific* (*p*) a smack was held in fault for exhibiting no light or flare to a steamship which overtook and ran into her. The smack had her trawl down, and was carrying suspended from her weather cross-tree a white light in a globular lantern. It was held that, even if the light was not obscured to a vessel coming up on the

(*i*) But see *The Stakesby*, 15 P. D. 166, which decides that it is not an infringement of the Regulations to carry the stern light (Art. 11) fixed. In that case it was held that where there were a number of vessels about and overtaking a barque in tow, it was not improper for the barque to carry the stern light fixed and permanent, as a guide to passing vessels. "I should be inclined to construe the article (Art. 11) thus: that the flashing of a light, which is a thing done on a sudden, is sufficient; but not, therefore, that a fixed light is an infringement of the article," per Sir James Hannen, 15 P. D. 167. The Washington Regulations (Art. 10) allow the stern light to be fixed, but it must not show ahead.

(*j*) See *infra*, p. 570.

(*k*) 14 P. D. 73.

(*l*) 13 P. D. 51.

(*m*) Ad. Div. 28th June, 1887.

(*n*) 13 P. D. 14; see also *The Fire Queen*, 12 P. D. 147, where the light was on a raised deck aft.

(*o*) *The Breadalbane, ubi supra; The Patroclus*, 13 P. D. 54.

(*p*) 9 P. D. 124.

smack's lee quarter by the peak of her mainsail, and was visible all round the horizon, the light carried was not such a light as is required by Art. 11. Art. 11.

Before Art. 11 was in force (in 1874), it was held that a ship, not having a bright light available, was not in fault because she showed over her stern to an overtaking ship one of her side lights (*q*).

The second riding light required by the Mersey and the Humber rules (*r*) to be exhibited at the after-part of vessels riding, and the fixed stern light required by the Mersey river rules for a steamship under way, are to be distinguished from the temporary light for overtaken ships required by Art. 11 of the General Regulations.

Sound Signals for Fog, &c.

Article 12 (*s*).

A steam-ship shall be provided with a steam whistle or other efficient steam sound signal, so placed that the sound may not be intercepted by any obstructions, and with an efficient fog-horn to be sounded by a bellows or other mechanical means, and also with an efficient bell. A sailing-ship shall be provided with a similar fog-horn and bell (t). In fog, mist, or falling snow, whether by day or night, the signals described in this Article shall be used as follows—that is to say,— Art. 12. Sound signals for thick weather.

(a) *A steam-ship under way shall make with her steam whistle, or other steam sound signal, at intervals of not more than two minutes, a prolonged blast.*

(b) *A sailing-ship under way shall make with her fog-horn at intervals of not more than two minutes, when on the starboard tack one blast, when on the port tack two blasts in*

(*q*) *The Anglo-Indian*, 3 Asp. Mar. Law Cas. 1.

(*r*) See Appendix, pp. 567, 570; *The Ripon*, 10 P. D. 65.

(*s*) Article 15 of the Washington Regulations, to which this corresponds, contains many new fog signals; *e. g.*, for vessels anchoring at sea; towing and being towed; when under way but stationary.

(*t*) In the copy of the Regulations published in the London Gazette of 22nd August, 1884, is the following note:—"In all cases where the Regulations require a bell to be used, a drum will be substituted on board Turkish vessels."

Art. 12. *succession, and when with the wind abaft the beam three blasts in succession.*

(c) *A steam-ship and a sailing-ship when not under way shall, at intervals of not more than two minutes, ring the bell* (*u*).

This Article is identical with Art. 12 of the Regulations of 1880. It goes into more detail, and is in some respects different from the corresponding Regulation (Art. 9) of 1863. It contemplates sirens taking the place of steam whistles; it makes the blasts of the whistle and horn more frequent; and the indication of the sailing ship's tack by sound is entirely new (*x*).

Care must be taken that the "prolonged" blasts of Art. 12 are such as to be distinguishable from the "short" blasts of Art. 19 used to indicate an alteration of the helm (*y*).

It is the duty of a sailing ship tacking in a fog to continue to make the signals for the tack that she was on when she began to go about, and not to change the signal until she gets the wind on the other side (*z*).

Sound signals to be used in thick weather first received statutory sanction by the Admiralty Regulations of 1st October, 1858. A direction to indicate a sailing ship's tack by sound signal (a horn on the starboard tack and a bell on the port) was also contained in these Regulations. The Regulations of 1863 contained no reference to this latter precaution.

A ship is under way within the meaning of this Article when she is not fast to the shore, or to moorings, or held by her anchor (*a*). Therefore, a ship stationary in the water, making no way, in a flat calm, must sound her fog-

(*u*) "Rapidly for about five seconds": Washington Conference Regulations, Art. 15 (*d*).

(*x*) In America these sound signals have been in use for several years.

(*y*) By the Washington Regulations a prolonged blast is from four to six seconds' duration.

(*z*) *The Constantia*, 6 Asp. M. C. 478.

(*a*) See *supra*, p. 366.

horn or steam whistle, provided her anchor is not down and holding. Under the Regulations of 1863 it was held that a sailing ship hove-to in a fog should sound her bell (*b*). Art. 12.

Before the enactment of any regulation as to sound signals, it was held to be the duty of a vessel to sound a horn in a fog (*c*).

By local rules in force in different waters ships are required to sound their horns at various intervals. In America it has been held gross negligence in a steamship not to be fitted with a whistle (*d*).

What amount, or density, of fog must exist so as to make the use of the fog signals necessary, has not been decided by the Courts of this country. A definition arrived at by an American Court is probably sufficiently accurate. It was there said that, to give the Article a reasonable meaning, we must suppose that its intent is to give to approaching vessels a warning of which the fog would otherwise deprive them, and that it applies where there is fog enough to shut out the view of the sails, or hull, by day, or of the lights by night, until the vessels are so close that there would be risk of collision (*e*). What is "fog" within the meaning of Art. 12.

Where a vessel is in the neighbourhood of a fog bank, or has reason to think that there may be other vessels near her enveloped in fog, the fog signals should be sounded, though she herself is not in a fog (*f*). This is a reasonable precaution, but it does not appear to be expressly directed by Art. 12, and the omission to do so could hardly be held to be an infringement of the Regulations.

A vessel using a mouth-horn, and not provided with a mechanical fog-horn, was held in fault for a collision under 36 & 37 Vict. c. 85, s. 17 (*g*).

(*b*) *The Pennsylvania*, 3 Mar. Law Cas. O. S. 477 ; and see 19 Wall. 125.

(*c*) *The Carron*, 1 Sp. E. & A. 91.

(*d*) *The Electra*, 1 Bened. 282.

(*e*) *The Monticello*, Dist. Ct. of Mass. U. S. ; 1 Parsons on Shipp. 566 (ed. 1869).

(*f*) *The Milanese*, 4 Asp. Mar. Law Cas. 318.

(*g*) *The Love Bird*, 6 P. D. 80.

Art. 12.

Art. 12 does not in terms require the fog-horn to be sounded by mechanical means. Many mechanical horns are capable of being sounded by mouth, and there is reason to think that they are sometimes so used. If it were proved that the horn had been blown by mouth, and not by the bellows or piston, when the ships were at such a distance apart that the horn might have been heard earlier if it had been sounded by the mechanism, the ship on board of which it was blown by mouth would probably be held in fault for the collision.

It appears to be the custom of Nova Scotia fishermen to sound a fog-horn when at anchor (*h*). Such a practice is illegal.

The Thames rules differ from Art. 12 of the general Regulations in not requiring the mechanical fog-horn (*i*).

Proof that a fog-horn was blown at proper intervals on board ship A. will not always raise a presumption of negligence on the part of those on board ship B., who swear that they were listening and heard no fog-horn. Nor will such evidence on the part of B. necessarily prove that no horn was blown by A. (*k*).

Art. 10, *supra*, provides special fog-signals for trawlers with their gear fast to the bottom; for trawlers with their trawls down; and for drift-net fishermen riding to their nets.

Speed of Ships to be moderate in Fog, &c.

ARTICLE 13 (*l*).

Art. 13.

Speed in thick weather to be moderate.

Every ship, whether a sailing ship or steam-ship, shall, in a fog, mist, or falling snow, go at a moderate speed.

This Article is identical with Art. 13 of the Regulations of 1880. The Regulations of 1863 contained no similar

(*h*) See *Lohnes* v. *The Barcelona*, 10 Quebec L. R. 305.

(*i*) See *infra*, p. 580.

(*k*) See *supra*, p. 32.

(*l*) Corresponding to Art. 16 of the Washington Regulations. This article contains a special rule for steamships hearing a fog signal.

provision as to sailing ships' speed; and the reference to snow is new. As to steamships the Article corresponds, and is in terms nearly identical, with part of Art. 16 of the Regulations of 1863. Art. 13.

Apart from the Regulations, the law requires a ship to be navigated in a fog at a moderate speed (*m*). The Article makes no alteration in the law in this respect. But the effect of an infringement of it, combined with the operation of 36 & 37 Vict. c. 85, s. 17, must not be overlooked. A ship navigating at an improper rate of speed in thick weather would almost inevitably be held guilty of negligence contributing to the collision; and, under the existing law, without reference to the question whether the rate of speed was a cause of the collision (*n*).

Article 13 cannot be broken without at the same time breaking Article 18 (*o*).

"Moderate" speed is a relative term. It cannot be defined so as to apply to all cases; what it should be in each case depends on the circumstances of the particular case. It may be stated as a general rule, that speed such that another vessel cannot be seen in time to avoid her, is unlawful (*p*). Speed which is justifiable in an unfrequented part of the ocean is unlawful, and even criminal, in a crowded roadstead or highway (*q*); and speed that would be moderate for a handy paddle-wheel tug, may be highly improper for a low powered, heavy, screw steamship (*r*). What is "moderate" speed.

In the case of *The Europa* (*s*), it was said by the Privy Council: "This may be safely laid down as a rule on all

(*m*) See *The Juliet Erskine*, 6 Not. of Cas. 633; *The Lord Saumarez*, 6 Not. of Cas. 600.

(*n*) As to the effect of improper speed under the old law, see *The Lord Saumarez*, 6 Not. of Cas. 600.

(*o*) *Per* Lord Esher, M. R., 11 P. D. 25.

(*p*) *The City of Brooklyn*, 1 P. D. 276; 3 Asp. Mar. Law Cas. 230; *The Smyrna*, 2 Mar. Law Cas. O. S. 93; *The Samphire* and *The Fanny Beck*, Holt, 193; *The Zadok*, 9 P. D. 114; *The Attila*, 5 Quebec L. R. 340.

(*q*) *The Europa*, 14 Jur. 627; *The Dordogne*, 10 P. D. 6.

(*r*) See *The Elysia*, 4 Asp. Mar. Law Cas. 540.

(*s*) 14 Jur. 627.

Art. 13. occasions, fog or clear, light or dark, that no steamer has a right to navigate at such a rate that it is impossible for her to prevent damage, taking all precaution at the moment she sees danger to be possible; and if she cannot do that without going less than five knots an hour, then she is bound to go at less than five knots an hour." In *The Batavier* (*t*), it was said by Dr. Lushington: "At whatever rate she (the steamship) was going, if going at such a rate as made it dangerous to any craft which she ought to have seen, she had no right to go at that rate."

A rate of speed which is "moderate" for vessels in the open sea, and out of anchorage ground, would not necessarily be "moderate" for a vessel navigating with a fair tide in a river or roadstead, where vessels are likely to be brought up. As regards danger to vessels at anchor, the speed of the other ship over the ground, and not through the water, is that which must be considered; and in such cases the strength and direction of the tide must be taken into account. As regards danger to vessels under way the tide is immaterial.

The duty of a steamship in a fog hearing another approaching her is considered below in connection with Art. 18; but Art. 13 applies also in such a case, and speed which was "moderate" when no vessel was known to be near may be illegal after the whistle or horn of another is heard to be approaching (*u*). With a fog-whistle sounding ahead, moderate speed for a steamship is "to go as slowly as he can, only keeping his vessel well under command."

The object of Art 13 is, not merely that vessels should go at a speed which will lessen the violence of a collision, but also that they should go at a speed which will give as much time as possible for avoiding a collision when another ship suddenly comes into view at a short distance (*x*).

(*t*) 1 Sp. E. & A. 378.
(*u*) *The Dordogne*, 10 P. D. 6, 11.
(*x*) See *per* Sir J. Hannen, *The Zadok*, 9 P. D. 114, 115.

Art. 13.

Seven knots an hour was held by the Privy Council to be too high a rate of speed for an ocean steamship in a fog in the track of ships 200 miles to the eastward of Sandy Hook (*y*); and even four knots has been held too fast for a steamship in the ocean in a fog so dense that another ship could not be seen seventy yards off (*z*). In *The Zadok* (*a*), something over five knots was held by Sir J. Hannen too fast for a barque in a fog in the English Channel. In the Clyde six or seven knots over the ground was held too much for a steamer in a thick fog (*b*). Off Cromer, with a whistle sounding ahead, three-and-a-half knots (*c*), and in the sea ten miles off Ushant four knots, have been held too fast (*d*).

It has been held in America that it is not enough to slacken until the speed is such as would enable the steamship to avoid another vessel which is sounding her foghorn (*e*). And from the English decisions it appears that the rate must be regulated by the thickness of the fog, and the probability of falling in with other ships, rather than by the supposed distance at which a horn or bell would be audible.

Mail ships.

It is, of course, no excuse for excessive speed that the ship is carrying mails, and under contract to deliver them by a certain date (*f*). The common excuse, that a rate of speed greater than is consistent with safety to other ships is necessary for steerage way, is seldom listened to by the Courts; nor the suggestion that the ship was run at considerable speed in order to get out of the fog (*g*).

Excuses for too great speed.

(*y*) *The Pennsylvania*, 3 Mar. Law Cas. O. S. 477; see also *The City of Brooklyn*, 1 P. D. 276.

(*z*) *The Magna Charta*, 1 Asp. Mar. Law Cas. 153. So in *The Dordogne*, 10 P. D. 6, three-and-a-quarter to four was said to be too fast in the sea ten miles off Ushant.

(*a*) 9 P. D. 114.

(*b*) *Little* v. *Burns*, *The Owl* and *The Ariadne*, 9 Sess. Cas. 4th ser. 118.

(*c*) *The Ebor*, 11 P. D. 25.

(*d*) *The Dordogne*, 10 P. D. 6.

(*e*) *The Hansa*, 5 Bened. 501.

(*f*) *The Virid*, Swab. Ad. 88; 10 Moo. P. C. C. 472; *The Northern Indiana*, 3 Blatchf. 92.

(*g*) *The Hansa*, 5 Bened. 501, 521; *The Chancellor*, 4 Bened. 153, 164.

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It is a common excuse that the ship was going as slow as she could; that she would not steer, or that her engines would not turn over, if she had tried to go slower. The answer to this was given by Hannen, P., in a recent case. He said that if a steamship is so constructed that she cannot go at a moderate speed, she navigates at her own risk (*h*). And Butt, J., said, in another case (*i*), that it was the duty of a steamer in such circumstances to occasionally stop her engines.

Where the fog was so dense that a steamship heard the whistle and hailing from another without being able to see her, it was held that her duty was to stop at once and hail the other vessel (*k*). In a fog so dense that it is not possible for a ship to see others in time to avoid them, she is not justified in being under way at all, except from necessity. Neither Art. 13, nor Art. 18, justifies her in being under way under such circumstances (*l*). In America, it was said by the Supreme Court of the United States that a steamship must lie-to if she is in a fog in a crowded part of the sea and cannot go ahead so as to have steerage way on her without danger to other vessels (*m*).

An inward-bound ocean steamship of 2,435 tons register was overtaken near the North-West Lightship in Liverpool Bay by a very dense fog. She lay with her engines stopped driving stern foremost in an E.S.E. direction towards Liverpool with the flood tide. It was held that she was not in fault for not having brought up (*n*).

(*h*) *The Irrawaddy*, Ad. Div., 15th June, 1887.

(*i*) *The Resolution*, 6 Asp. M. C. 363; see also *per* Hannen, P., in *The Rosetta*, *ibid.* 310.

(*k*) *The Frankland* and *The Kestrel*, L. R. 4 P. C. 529; *The Kirby Hall*, 8 P. D. 71; *The Dordogne*, 10 P. D. 6; and see *The Teutonia*, 23 Wall. 77.

(*l*) *The Lancashire*, L. R. 4 A. & E. 198; *The Otter*, *ibid.* 203; *The Girolamo*, 3 Hag. Ad. 169; *The North American* and *The Wild Rose*, 2 Mar. Law Cas. O. S. 319; *Smith* v. *St. Laurence Tow Boat Co.*, L. R. 5 P. C. 308; *The Orion*, 2 Mar. Law Cas. O. S. Dig. 822; *The Victoria*, 3 W. Rob. 49; *The Perth*, 3 Hagg. 414; and see cases cited *supra*, pp. 250, 397.

(*m*) *The Pennsylvania*, 19 Wall. 125.

(*n*) *The Kirby Hall*, 8 P. D. 71.

Art. 13.

Steamship lying dead in the water.

It would seem that Art. 13 does not apply to a steamship lying dead in the water with her engines stopped. It neither requires her to get under way, nor forbids her to move her engines ahead or astern (*o*). Whether a heavy steamship in the track of ships is justified in placing herself in such a helpless position, or whether it is her duty to do so under some circumstances, is a difficult question for an officer to decide, and must depend upon the circumstances of the particular case.

Duty of steamship in a fog.

The duty of a steamship under way in a fog has been thus stated by the Supreme Court of the United States:— "The best precautions are bright signal lights; very low speed—just sufficient to subject the vessel to the command of her helm; competent look-outs properly stationed and vigilant in the performance of their duties; constant ringing of the bell or blowing of the fog-horn, as the case may be; and sufficient force at the wheel to effect, if necessary, a prompt change in the course of the vessel" (*p*).

Pressure of steam when going slow.

It has been said in an American case that the meaning of the rule that a steamship shall in a fog go at a moderate speed is, not that she shall only have such a pressure of steam as will enable her to go slow, but that she shall have her full steam power, and still go slow, so that she may be able to bring herself to a standstill as soon as possible (*q*).

Alteration of course.

The mere alteration of course in a fog by a steamship hearing the whistle of an approaching vessel, is not necessarily negligence, though it is made upon a guess as to the distance, position, and course of the other ship (*r*).

(*o*) See *The Boskenna Bay*, *infra*, p. 407.

(*p*) *The Colorado*, 1 Otto, 692; cf. *The Franconia*, 4 Bened. 181.

(*q*) *The Hansa*, 5 Bened. 501.

(*r*) *The Vindomora*, 14 P. D. 172; affd. in H. L., 60 L. J. Ad. 1. In *The Resolution*, 6 Asp. M. C. 363, Butt, J., had held that it was wrong to starboard for a whistle supposed to be two and a-half points on the starboard bow, and that the proper manœuvre would have been at once to stop. It seems that no general rule can be laid down. See also *The Rosetta*, 6 Asp. M. C. 310.

Art. 13.

Speed of sailing ships in a fog.

Art. 18 does not apply to sailing ships (*t*); but undue speed in a fog or thick weather is not more justifiable for sailing ships than for steamships. Where a sailing ship had her studding sails set in a thick fog and came into collision with another ship, Dr. Lushington said: "It is unquestionably the duty of a master in intense fog to exercise the utmost vigilance, and to put his vessel under command, so as to secure the best chance of avoiding all accidents, even though such precautions may occasion some delay in the prosecution of the voyage" (*u*). But in this, and in another case (*x*), the sailing ship, though under a press of sail in a fog, was not therefore held in fault for the collision. And in *The Elysia* a brig in the Atlantic carrying all plain sail and going five knots in a fog was held free from blame (*y*).

In *The City of Brooklyn* (*z*), Lush, J., said, as to speed: "I think the rule of law with regard to travelling at sea is identical with the law of travelling on the high road. No one on a dark night has a right to go at such a rate of speed as not to be able to escape an accident if he happens to follow immediately in the wake of another, whether it be by sea or land."

In very thick weather, or great darkness, a vessel is not justified in running through a crowded roadstead, but should, if possible, bring up (*a*). Nor is she justified in the Thames in leaving a wharf in a dense fog for the purpose of going up the river on a flood tide; and it has been said that the proper way to go up, under such circumstances, is stern first, dredging with the anchor on the ground, so as to be able to bring up at a moment's notice (*b*).

(*t*) *The Dordogne*, 10 P. D. 6, 12.
(*u*) *The Itinerant*, 2 W. Rob. 236.
(*x*) *The Ebenezer*, *ibid.* 206.
(*y*) 4 Asp. Mar. Law Cas. 540.
(*z*) 3 Asp. Mar. Law Cas. 230.
(*a*) *The Victoria*, 3 W. Rob. 49; *The George*, 4 Not. of Cas. 161; *The Lochlibo*, 7 Moo. P. C. C. 427.
(*b*) *The Aguadillana*, 6 Asp. M. C. 390.

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A sailing ship going six-and-a-half knots over a fishing ground on a dark night, when vessels were visible only 100 or 200 yards off, was held in fault for a collision with a trawler (*c*).

In *The Harton*, a steamship entering a fog bank at a speed of eight knots was held in fault (*d*).

In *The Zadok* (*e*), a barque with nearly all the canvas set which she could carry, going five knots or upwards in a fog in a frequented part of the English Channel, was held in fault, under Art. 13, for not going at a moderate speed. In the same case Sir J. Hannen said, that it is the duty of a sailing ship in a fog, where she cannot see her way, to moderate her speed to the point at which she has just way sufficient to have the power of controlling her movements. A similar rule has been laid down (*obiter*) in the Court of Appeal (*f*).

Inevitable accident cannot be pleaded where speed is excessive.

A vessel going at too great a rate of speed on a dark night, or in thick weather, cannot be heard to say that a collision was the result of inevitable accident (*g*). Under such circumstances it is her duty to go at such a rate of speed as will enable her, after discovering another vessel, to avoid her by stopping and reversing her engines (*h*). If her speed is higher than this, she will, almost certainly, be held in fault for any collision that may occur, although she does her best to avoid it when the other ship is seen (*i*).

It has been said that where a sailing ship in a fog is aware of the proximity of another vessel, though unable to see her, it is the duty of the person in charge to order his people to stand by the sheets and braces, in order to manœuvre the sails, and assist the helm, at the first moment the other ship is seen (*j*).

(*c*) *The Pepperell*, Swab. Ad. 12; cf. *The Frank*, 2 Quebec, L. R. 295, a barque on the banks of Newfoundland.

(*d*) Ad. Div., 3rd Aug. 1886.

(*e*) 9 P. D. 114.

(*f*) *The Dordogne*, 10 P. D. 6, 12.

(*g*) *The Juliet Erskine*, 6 Not. of Cas. 633.

(*h*) *The Smyrna*, 2 Mar. Law Cas. O. S. 93.

(*i*) *The Samphire* v. *The Fanny Beck*, Holt. 193.

(*j*) See *The Zadok*, 9 P. D. 114, 117.

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In *The Beta* (*k*), a schooner at night in a dense fog in the Bristol Channel was held in fault for not going at a moderate speed within the meaning of Art. 13. It does not appear what her speed was; but she had all plain sail set, and it was held that she was going faster than was necessary "to keep her under command." It is submitted that the decisions as to what is a "moderate" speed for small sailing ships bear heavily upon such vessels, and that they should not be carried any further. A small coaster with all plain sail set, sailing by the wind, is seldom going more than four or five knots, and it may be doubted whether she would be less likely to do damage if she shortened sail.

American cases as to moderate speed in a fog.

The necessity of moderate speed in thick weather has been insisted upon in numerous American cases. In a judgment of the District Court of New York it was said that in a dense fog a ship is bound to go as slow as possible consistent with steerage way (*l*). Though not bound to lie-to (*m*), ships are required to use extra caution, and to put themselves under moderate sail in a fog (*n*). A schooner carrying on at night, and racing with another vessel, was held in fault for a collision (*o*).

Steamship's smoke obscuring lights and view.

If a steamship has the wind aft, so that her own smoke is blown ahead, obscuring her lights or the view from her deck, it is her duty to go at a moderate speed, and so that she may see and be seen by other vessels in time to avoid collision (*p*).

The duty of a steamship approaching another vessel with risk of collision, to slacken her speed, or to stop and reverse, is considered below (Art. 18).

The case of a steamship lying dead in the water in a thick fog, and hearing the whistle or horn of an approach-

(*k*) 9 P. D. 134.
(*l*) *The Westphalia*, 4 Benedict. 404.
(*m*) *The Morning Light*, 2 Wall. 550; *The Colorado*, 1 Otto, 692.
(*n*) *The Colorado*, *ubi supra*.
(*o*) *The Thomas Martin*, 3 Blatchf. 517.
(*p*) *The Rona* and *The Ava*, 2 Asp. Mar. Law Cas. 182; *The Vivid*, 7 Not. of Cas. 127.

ing vessel, is not provided for by the Regulations (*q*). Art. 13 does not, it is submitted, require her to get way on; nor, on the other hand, does Art. 18 require her not to move her engines (*r*). It is submitted that a sailing ship would not be held in fault for heaving-to for safety in a fog (*s*). Art. 13.

Ferry boats running in a fog.

The Lancashire was a Liverpool and Birkenhead ferry steamer. She left her landing stage to cross the Mersey in a dense fog, and ran into *The Levant*, a vessel brought up in her track. It was contended for *The Lancashire* that it was the custom of the ferry boats to run in all weathers, and that it was necessary for the convenience of the public that they should do so. *The Lancashire* was held in fault for the collision, on the ground that she had no right to be under way at all in such weather (*t*). In delivering judgment, the learned judge of the Admiralty Court (Sir R. Phillimore) said (*u*): "The question arises in this case, whether it was proper and right in this ferry boat to go deliberately across the river in a fog of such a dense nature as here described, and with the knowledge of these vessels lying in her track, or one of them in her track and the others nearly so, and also with the knowledge that one of them had, as she contends, an insufficient watch? It has been urged very strongly on the Court that, if this were not to be so, if the steam ferry boat was to be delayed on account of the fog, the greatest possible inconvenience would ensue to the public. I have no doubt that it is very much for the convenience of the public that the ferry boat should go in all weathers, and at all times; but at the same time, I cannot myself think it right to set the convenience of the public in competition

(*q*) See the Washington Regulations, Art. 15 (*b*), as to a special fog signal for a steamship under these circumstances.

(*r*) *The Boskenna Bay*, Ad. Ct. 14th Jan. 1885.

(*s*) See *The Attila*, 5 Quebec L. R. 340.

(*t*) *The Lancashire*, L. R. 4 A. & E. 198.

(*u*) L. R. 4 A. & E. 201.

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with the possibility, or rather the probability, of injuring human life and greatly damaging property. At the same time, the custom appears to have been for this vessel to have gone across in foggy weather, as at other times, and regulations appear to have been made with a view to preventing accidents, surrounding her with every precaution that was possible. . . . But one thing appears to me quite clear, that if this ferry steamer thinks herself justified in going across the river in such a dense fog as this, she takes upon herself all the responsibility incident to such a course. She has the advantage if she goes over safely, and she must have the disadvantage if she injures life or property in the course of the passage."

Law in America as to ferry boats running in a fog.

The law in America as to ferry steamers being under way in a fog seems to be more favourable to the ferry boats than that of this country, as laid down in *The Lancashire*. In *The Exchange* (*x*), the U. S. Circuit Court held, that while owners of ferry boats have not any exclusive privileges of navigation over owners of other vessels, nevertheless, while the public convenience requires the ferry boats to be running as constantly as possible, the rules which are applicable to the running of such a boat are, that while more than ordinary care, vigilance and caution are required on the part of the ferry boat, she is entitled to more than ordinary diligence on the part of other vessels to avoid her.

In another case (*y*), it was held that a ferry boat is not bound to stop running in a dense fog. There are other American cases to the effect that vessels are required to know the usual track of ferry boats, and to take precautions accordingly, and particularly not to anchor in their track (*z*).

The speed of vessels in some rivers (*a*) is regulated by

(*x*) 10 Blatchf. 168. See also *Hoffman* v. *Union Ferry of Brooklyn*, 68 N. York Rep. 385.

(*y*) *The Lydia*, 11 Blatchf. 415.

(*z*) *The Hudson*, 5 Beued. 206; *The Relief*, Olcott, 104.

(*a*) As in the Thames and Tees; see *infra*, pp. 574, 580.

local rules. These rules are usually applicable in all weathers, whether thick or fine. Art. 13.

Steering and Sailing Rules.

ARTICLE 14 (*b*).

Art. 14.

Two sailing-ships.

When two sailing-ships are approaching one another so as to involve risk of collision, one of them shall keep out of the way of the other, as follows, viz. :—

(a) *A ship which is running free shall keep out of the way of a ship which is close-hauled.*

(b) *A ship which is close-hauled on the port tack shall keep out of the way of a ship which is close-hauled on the starboard tack.*

(c) *When both are running free with the wind on different sides, the ship which has the wind on the port side shall keep out of the way of the other.*

(d) *When both are running free with the wind on the same side, the ship which is to windward shall keep out of the way of the ship which is to leeward.*

(e) *A ship which has the wind aft shall keep out of the way of the other ship.*

This Article is identical with Art. 14 of the Regulations of 1880. It is different in form from the meeting and crossing rules (Arts. 11 and 12) of the Regulations of 1863 (*c*). Its effect, however, is the same, except in one

(*b*) Corresponding to Art. 17 of the Washington Regulations.

(*c*) As to the origin of the "port-tack" rule, and of the rule that a ship with the wind free shall keep out of the way, see *supra*, p. 339. Except, perhaps, as to paragraph (a), the rules of Art. 14 embody the previous practice of seamen, irrespective of legislation. But the practice seems to have been loose. Whether the ship on the port tack was always required to bear up and go under the stern of the other, or whether she was at liberty to keep out of the way by taking other steps, was uncertain: see *The Rose*, 2 W. Rob. 1; *The Dumfries*, Swab. Ad. 125; *The Gazelle*, 5 Not. of Cas. 101. The rule that the ship on the port tack must give way was applied to a ship with the wind a point or two free: *The Stranger*, 6 Not. of Cas. 36; and also where the course of the other ship was doubtful: *The Traveller*, 2 W. Rob. 197; *The Anne and Mary*, *ibid.* 189; *The George*, 5 Not. of Cas. 368.

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case—that of two sailing ships meeting end on, that is to say, with their masts or keels in a line, or nearly so. Such vessels were required by Art. 11 of the Regulations of 1863 to put their helms to port, a manœuvre obviously dangerous for a vessel close-hauled on the starboard tack. The effect of putting the helm of a ship close-hauled on the starboard tack to port being, in many cases, to throw the ship out of command, and to cause imminent risk of collision, it was, under the port-helm rule of former Acts, often a question of difficulty whether a ship close-hauled on the starboard tack broke the law by not porting (*d*). As to what is "risk of collision," see above, p. 348.

"Running free:" meaning of the term.

The classification of sailing ships contained in this Article occasions some difficulty. It is probably intended to be an exhaustive and not a cross classification. It is doubtful whether it is either the one or the other; and the wording is at least ambiguous. "Running free" appears to mean not close-hauled; but the phrase is not happily chosen to describe a ship ramp full, *i. e.*, having the wind a point or two free and forward of the beam (*e*). The words "with the wind abaft the beam" occur in Art. 12. Again, the question arises, whether a vessel which "has the wind aft" can at the same time be "running free"; and, if so, whether (d) or (e) prevails; whether, if she is to leeward of the other ship, Art. 14 requires her to keep out of the way under (e), or to keep her course under the combined operation of (d) and Art. 22. A further question arises, as to how the

(*d*) See *The Norge* and *The Wolverine*, Holt's Rule of the Road, 89; *The Amalia* and *The Maria*, *ibid.* 87; *The Princessan Lovisa* and *The Artemas*, *ibid.* 75. Under the former Acts see *The Betsy*, 1 Sp. E. & A. 34, note; *The Clarence*, *ibid.* 206; *The Halcyon*, Lush. 100; *Chadwick* v. *City of Dublin Steam Packet Co.*, 6 Ell. & Bl. 771; *The Dumfries*, Swab. Ad. 125. American cases on the same point are—*The Tracy J. Bronson*, 3 Bened. 341; *The Helen J. Holway* and *The Moore*, 6 Bened. 536; *The Annie Lindsay*, *ibid.* 290; *The Sylvester Hale*, *ibid.* 523.

(*e*) A ship in this condition appears to be treated as close-hauled in the trades, though such a view was not countenanced by the Court: *The Earl Wemyss*, 6 Asp. M. C. 364; on app. 61 L. T. N. S. 289.

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dividing line between "running free" and having "the wind aft" is to be drawn; whether, for example, a ship with the wind on the quarter, say, three points from dead aft, "has the wind aft." These difficulties will be found discussed at length in *The Privateer* (*f*), an Irish case. In that case the Court appears to have been of opinion that a ship may at the same time be "running free" and have "the wind aft"; and it appears to have been held in the same case that a ship with the wind about two points free was close-hauled; but the latter view receives no support from the Master of the Rolls, who recently expressed the opinion that a ship might be close-hauled when sailing a point off the wind, but doubted whether she would be so when sailing a point and a-half off (*g*).

In *The Singapore* (*h*), decided under the Regulations of 1863, Lord Westbury appears to have used the phrase "running free" as equivalent to "free"—the term used in Art. 12 of of the Regulations of 1863. But in that case the ship, heading E. with the wind at N.W., was clearly both free and running.

In *The Spring* (*i*) a smack with the wind from two to four points from dead aft was held to have the wind aft within the meaning of Art. 12 of the Regulations of 1863.

A ship required to keep out of the way may do so in any way she thinks proper.

A ship required by the Regulations to keep out of the way of another may do so in any way she thinks proper. She may go ahead or astern of the other, and she may put her helm to port or starboard, as she thinks best (*k*). But she has no right to embarrass the other, or to put her into a difficulty. Thus, it has been held in America (*l*), that where two courses are open to a vessel required to keep out of the way, and she selects the more hazardous, she is

(*f*) 7 L. R. Ir. 105; *infra*, p. 418. See also *The Byfoged Christensen*, 4 App. Cas. 669.

(*g*) *The Earl Wemyss*, 61 L. T. N. S. at p. 290.

(*h*) L. R. 1 P. C. 378.

(*i*) L. R. 1 A. & E. 99.

(*k*) *The Nor*, 2 Asp. Mar. Law Cas. 264; *The Carroll*, 8 Wall. 302; *The Great Eastern*, 2 Mar. Law Cas. O. S. 97. The Washington Regulations, Art. 22, require her to avoid "crossing ahead of the other."

(*l*) *The Empire State*, 1 Bened. 57.

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responsible for a collision that would not have occurred if she had taken the safer course.

Art. 14 is supplemented and modified by Art. 20 and Art. 22.

Art. 14 is supplemented by, and must be read with, Arts. 20 and 22; the former requires a sailing ship overtaking another to keep out of the way (*m*); the latter requires the overtaken ship to keep her course (*n*). The difficulty which arose under the Rules of 1863, of drawing the line between "crossing" and "overtaking" ships (*o*), is intended to be removed by the opening words of Art. 20. It seems that under the existing Regulations a sailing ship which is travelling faster than another ahead or anywhere forward of her own beam and coming up with her, must keep out of the way (*p*). It will be observed that the word "crossing," which governed the corresponding Article (12) of the Regulations of 1863, does not occur in the Article now under discussion.

Duty of ship required to keep her course to stand on;

The duty of the ship close-hauled on the starboard tack, under Art. 14, is strictly to obey the rule requiring her to keep her course. She can excuse a departure from that rule only by showing that it was necessary to avoid immediate danger (*q*). "Keeping her course" under Art. 22 means keeping her course by the wind. If in so doing she comes to or breaks off a little, she does not thereby infringe Art. 22 (*r*); though it is an infringement if, alleging that she is close-hauled, she comes up as much as two and a-half points (*rr*). But a vessel would not be justified by Art. 14 in standing on obstinately where it is clear that a collision may be avoided if she alters her helm, and in no other way (*s*).

though it is an infringement to come up as much as two points and a-half.

The rule requiring a ship close-hauled on the starboard tack to stand on appears formerly not to have been so strict as it is under the existing law. Formerly, where

(*m*) See *infra*, p. 457.
(*n*) See *infra*, p. 471.
(*o*) See *infra*, p. 426.
(*p*) See *The Seaton*, *infra*, p. 459.
(*q*) See Art. 23, *infra*, p. 480.
(*r*) *The Marmion*, 1 Asp. Mar. Law Cas. 412; *The Aimo* and *The Amelia*, 2 Asp. Mar. Law Cas. 96.
(*rr*) *The Earl Wemyss*, 6 Asp. M. C. 364; on app. 61 L. T. N. S. 289.
(*s*) *The Lake St. Clair* and *The Underwriter*, 2 App. Cas. 389.

two vessels on opposite tacks were approaching with risk of collision, it was held to be the proper course for both to put their helms to port (*t*). Such is not now the law. Before altering her helm, a ship must ascertain what course the other ship is upon, and how she has the wind. Her duty is to wait until she knows what the Regulations require her to do. A wrong step taken by a ship in ignorance of the other's course will cause her to be held in fault if a collision ensues. Art. 14.

Hence arise cases of great perplexity to seamen. A ship, A., close-hauled on the port tack, sees a red light of another, B., ahead, and a point or two on his starboard bow. He cannot make out what is B.'s course. Not knowing which Article of the Regulations applies to his case, A. stands on, and at the last moment bears up, thinking, erroneously, that B. is close-hauled on the starboard tack. At the same moment, B., who has the wind free, bears up. A collision follows, for which A. is probably held in fault, because he did not keep his course. The temptation for A., on first seeing B., to bear up, go about, wear, or to take other steps which he thinks will avoid risk of collision, without regard to the Regulations, is strong. A hard case.

The following illustration may be suggested :—The wind being north, a ship close-hauled on the port tack and heading E.N.E., sees, within a quarter of a mile, and on her lee bow, a red light. The vessel to which it belongs may be either in stays, and heading N., or she may be close-hauled on the starboard tack, and heading from N.W. to W.N.W.; or, again, she may have the wind free and be heading from W.N.W. to W. by S. In the first case supposed, the rapid alteration in the bearing of the light as it crossed her bows would assist her in arriving at the conclusion that the other ship was close-hauled on the

(*t*) *The Seringapatam*, 5 Not. of Cas. 61, 65.

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starboard tack and heading about N.W., and in this case the duty of the first ship is clear—to keep out of the way. On the other hand, if the ship to which the red light belonged were light, under low sail, and making considerable lee-way, the alteration in the bearing of the light would be very slow, and it might easily be mistaken for the light of a ship having the wind free. In this case it would be very difficult for the ship on the port tack to appreciate the actual circumstances of the situation in time to comply with the Regulations so as to avoid a collision.

In *The Theodore H. Rand* (*c*), the ship on the port tack was held not to be in fault, although she bore up and so caused the collision, because she could not, with reasonable care, have known that the other ship was running free.

Meaning of "close-hauled."

A vessel may be close-hauled within the meaning of Art. 14, although she is not lying so close to the wind that she cannot luff a trifle without throwing herself in stays (*d*). In *The Breadalbane* (*e*), a brig, heading six points from the wind, and a ship, with her fore-topsail carried away, heading seven-and-a-half points from the wind, were held to be both close-hauled. A ship sailing full and by, and being kept "a good full," would be close-hauled within Art. 14.

A ship with the wind free must keep out of the way of a ship hove-to, by virtue, it seems, of Art. 14 (a) or Art. 14 (e); for a ship hove-to is close-hauled within the meaning of this Article (*f*).

Whether a ship hove-to is within Art. 14 and required

It has already been stated (*g*) that Art. 5, relating to ships not under command, probably does not apply to a ship hove-to in the ordinary course of navigation. Art. 14,

(*c*) 12 App. Cas. 247.

(*d*) *The Singapore* and *The Hebe*, Holt, 124; L. R. 1 P. C. 378, 383; *Chadwick* v. *The City of Dublin Steam Packet Co.*, 6 Ell. & Bl. 771; *The Earl Wemyss*, 6 Asp. M. C. 364; on app. 61 L. T. N. S. 289.

(*e*) 7 P. D. 186.

(*f*) *The Eleanor* v. *The Alma*, 2 Mar. Law Cas. O. S. 240; *The Rosalie*, 5 P. D. 215; *The James*, Swab. 60; *The London*, 6 Not. of Cas. 29; *The Blenheim*, 1 Sp. E. & A. 285.

(*g*) *Supra*, p. 373.

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to keep out of the way.

therefore, applies to a ship lying-to, so as to require her to keep out of the way, notwithstanding her comparatively helpless condition. In a case (*h*) decided in 1847, the facts were as follows: *The Lavinia*, a schooner close-hauled on the starboard tack, came into collision in broad daylight with *The London*, a schooner hove-to on the port tack. The crew of *The London* were engaged in reefing her topsail. The helm of *The Lavinia*, which had been lashed a-lee, was put over to port shortly before the collision. *The Lavinia* kept her course up to the moment of collision, and hailed *The London* to port. It was held that *The London* was solely in fault.

In the case of *The Young Alonso* a dandy-rigged smack, hove-to on the port tack, was held in fault under Art. 12 of the Regulations of 1863, for a collision with *The Rosalie*, a three-masted schooner, close-hauled on the starboard tack. The collision was in the daytime in clear weather, and *The Rosalie* (*i*) was held to be also in fault. It does not appear that either vessel did anything to avoid the collision.

Tug drifting.

A tug drifting about in the track of ships without sufficient steam to get way upon her, was held in fault in a colonial case (*k*).

Sailing ship hove-to.

The following American case is instructive upon a point which does not appear to have been sufficiently considered in the English cases. A schooner, with the wind free, was in collision with a pilot boat lying-to with her helm lashed a-lee. The pilot boat was forging ahead at the rate of about a knot an hour, as she kept coming to and falling off. Both vessels were, in 1866, held by the District Court of the United States to be in fault for the collision: the schooner for not keeping out of the way of

(*h*) *The London*, 6 Not. of Cas. 29. *The Blenheim*, 1 Sp. E. & A. 285 (decided in 1854), is a very similar case; *The James*, Swab. 60. But see *The Eleanor*, *ubi supra*.

(*i*) 5 P. D. 245.

(*k*) *The Byron*, 2 New South Wales L. R. Ad. 1.

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a vessel which was "close-hauled," and the pilot boat for not keeping her course. The Court said that the proper course for those on board the pilot boat to have taken was to get way on her, so as to keep a steady course (*l*). This seems a reasonable decision as regards the duty of the pilot boat. It may well be doubted whether heaving-to in the track of ships and lashing the helm a-lee, in order to save the trouble of a hand at the helm, is not in itself negligence for which the ship should be held liable in case of collision (*m*). A vessel so situated is practically helpless to keep out of the way herself; and her lights are misleading to other ships because of her unsteady course and the lee-way she makes. It is a common practice for shrimpers in the Thames, and trawlers in the North Sea, to leave their vessels to drive with the tide in the manner described above. Line fishermen in the Channel and in the North Sea lower their head-sails and ease off the main sheet. A vessel so handled is wholly out of control, and in case of collision it is submitted she could not be heard to say that she was not in fault (*n*).

Heaving-to for safety, or other reason, in the ordinary course of navigation, is, of course, not negligence. It is submitted, however, that a ship hove-to is required to exercise more than ordinary care, so that she may not be an obstruction to navigation (*o*).

The following cases, decided under the Regulations of 1863, illustrate the application of Art. 14, and the circumstances under which it may be departed from :—

Cases illustrating Art. 14.

Two ships were turning to windward in a narrow channel, both on the starboard tack, and one following in the wake of the other. The leading ship, having stood as far towards the side of the channel as was prudent, went

(*l*) *The Transit*, 3 Bened. 192.
(*m*) See *The Eleanor*, *ubi supra*.
(*n*) Notwithstanding the result of the Board of Trade inquiry in the case of *The Star*, 26th Nov. 1887.
(*o*) See *The Attila*, 5 Quebec L. R. 340.

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about. There was risk of collision if the other ship stood on. It was held that it was the duty of the following ship, although on the starboard tack, to go about when the leading ship did so (*p*).

In a case where the courses of the two ships were within a point of being directly opposite (W.N.W. and S.E. by E.), the Privy Council held that they were "crossing," and not "meeting," ships (*q*).

Where two vessels close-hauled on opposite tacks sighted each other at so short a distance that it was not possible for the ship on the port tack to avoid the other if the latter stood on, it was held that it was the duty of the latter to port and let go her head sheets (*r*).

Where a ship close-hauled on the port tack was unable to bear up owing to her head-gear being carried away, and the other ship, in ignorance of her disabled condition, kept her course, a collision which followed was held to be an inevitable accident (*s*).

Two heavy full-rigged ships were turning to windward in the St. Lawrence. One of them, *The Lake St. Clair*, whilst in stays, was struck by the other, *The Underwriter*, nearly at right angles on the starboard side. Those on board *The Underwriter* could not see that *The Lake St. Clair* was in stays in time to avoid her; but they might have avoided her if they had ported their helm when hailed to do so. *The Underwriter* was held in fault for not porting, and *The Lake St. Clair* for not having braced her head yards aback, and for having hauled her fore-yard (*t*).

The wind being somewhere from S. to S.S.E., the sloop *Constantine*, heading N.N.E., fell in with the cutter *Spring*, heading W. by S., and to leeward. It was held that it

(*p*) *The Priscilla*, L. R. 3 A. & E. 125; and see *The Lake St. Clair* and *The Underwriter*, 3 Asp. Mar. Law Cas. 361; *infra*.

(*q*) *The Constitution*, 2 Moo. P. C. C. 453.

(*r*) *The Lady Anne*, 15 Jur. 18.

(*s*) *The Aimo* and *The Amelia*, 2 Asp. Mar. Law Cas. 96.

(*t*) *Wilson* v. *Canada Shipping Co.*, *The Lake St. Clair* and *The Underwriter*, 2 App. Cas. 389.

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was the duty of *The Constantine* to keep out of the way, and that the duty of *The Spring* was to keep her course (*u*).

A full-rigged ship, with the wind free, crossing a brig and a schooner close-hauled on the same tack, was held in fault for approaching them so close that, upon the schooner going about, a collision with the brig was inevitable (*x*).

A ship just gathering way on the port tack, after going about, was held free from blame for a collision with another close-hauled on the starboard tack, which had approached her too near whilst in stays (*y*).

A collision occurred between the barque *St. Jean* and the barque *Privateer*. *The St. Jean* had the wind on the port side about two points free. *The Privateer* had the wind somewhere between dead aft and three points on the starboard quarter. It was held (in Ireland) that it was the duty of *The Privateer* to keep out of the way (*z*), either by virtue of Art. 14 (a) or Art. 14 (e). The case of *The Singapore* (*a*) was relied on as an authority for the proposition, that a vessel heading as much as eight points from the wind is "close-hauled" within the meaning of the Regulations. In that case a laden barque was heading seven points from the wind, and was held to be close-hauled. It is submitted that *The Singapore* is an extreme case, and that a vessel heading more than seven points from the wind cannot be properly said to be close-hauled.

A brig was heading E. by N. on the starboard tack, close-hauled, and a ship, also on the starboard tack, and said to be close-hauled (*b*), heading N.E. by E. half E., was to windward of her. Each vessel pleaded that the other, when first seen, was about four points abaft her own (*i.e.* the complainant's) beam. It appears to have been

(*u*) *The Spring*, L. R. 1 A. & E. 99.

(*x*) *The Mobile*, Swab. Adm. 69; on app. *ibid.* 127; this case was under a former Act.

(*y*) *The Charlotte Raab*, Brown, Ad. 453.

(*z*) *The Privateer*, 9 L. R. Ir. 105.

(*a*) L. R. 1 P. C. 378.

(*b*) She had carried away her fore-topsail shortly before the collision.

held that the allegation of the brig was proved—that the ship was overtaking the brig; and that her duty, therefore, was to keep out of her way. But the case is not satisfactory, for the Court appears to have been of opinion that the ships were, in fact, not within the overtaking (Art. 22) rule, but within Art. 14 (*c*). Art. 14.

Two ships, close-hauled on opposite tacks, were crossing each other. The ship on the starboard tack was held in fault for not keeping out of the way when the other, being ahead and to windward, could not bear up without risk of collision, and could not go about because of a shoal (*d*).

A sloop, with the wind free, was running through a narrow channel against a strong tide close to the shore. Two schooners, the combined length of which was equal to half the breadth of the channel, were beating to windward in the opposite direction. It was held that the sternmost of the schooners was in fault for standing on when under the stern of the leading schooner, so that when she was obliged to go about she ran into the sloop, which could not avoid her without going ashore (*e*).

Article 15 (*f*).

Art. 15.

Two ships under steam meeting.

If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.

This Article only applies to cases where ships are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two ships which must, if both keep on their respective courses, pass clear of each other.

The only cases to which it does apply are when each of the

(*c*) *The Breadalbane*, 7 P. D. 184.
(*d*) *The Ann Caroline*, 2 Mar. Law Cas. O. S. 208 (American case); cp. *The Maggie J. Smith*, 16 Davis, U. S. at p. 354.
(*e*) *The Mark Eveline*, 16 Wall. 348.
(*f*) Corresponding to Art. 18 of the Washington Regulations.

Art. 15. *two ships is end on, or nearly end on, to the other; in other words, to cases in which, by day, each ship sees the masts of the other in a line, or nearly in a line, with her own; and by night to cases in which each ship is in such a position as to see both the side lights of the other.*

It does not apply by day to cases in which a ship sees another ahead crossing her own course; or by night to cases where the red light of one ship is opposed to the red light of the other, or where the green light of one ship is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.

This Article is identical with Art. 15 of the Regulations of 1880. It contains the substance of Art. 13 of the Regulations of 1863, and of an Order in Council of the 30th of July, 1868, explaining the meaning of "end on" (*g*). The interpreting Order is said to have been made in consequence of the decision in *The Cleopatra* (*h*), by which the port helm rule of a former Act (*i*) was held to apply where the ships were on parallel courses green to green, each being on the starboard bow of the other (*k*).

The words "each shall alter her course to starboard" are exactly equivalent to "the helms of both shall be put to port" of the Regulations of 1863 (*l*). The words "so

(*g*) It is not clear that 25 & 26 Vict. c. 63, authorizes an interpretation of the Regulations by Order in Council. No Order in Council applied the interpreting Order to foreign ships out of British jurisdiction, and it has been doubted whether the interpreting Order ever affected foreign ships. Any difficulty upon this point is at an end since the existing Art. 15 has been in force.

(*h*) Swab. 135. The case was followed in *The Arabian*, 2 Stuart's V.-Ad. Rep. 72.

(*i*) 17 & 18 Vict. c. 104, s. 296.

(*k*) See *The Odessa*, 4 Asp. Mar. Law Cas. 493.

(*l*) The alteration in the wording of the Regulations was probably made with a view to a possible uniformity of system amongst the seamen of all nations as regards orders to the helm. In English ships the order which sends the ship's head to starboard is "port!" In France the equivalent order is "tribord!"—the literal translation of which is "starboard." In *London School Board* v. *Lardner*, Times, 20th Feb., 1884, a Thames pilot was held liable for a collision caused by his giving the order in French, "tribord!" with the in-

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that each may pass on the port side of the other" appear to be merely explanatory.

The vessels described in this Article as "ships under steam" are probably the same as those described elsewhere in the Regulations as "sea-going steamships," or "steamships"; and it is not clear why the same term is not used throughout. It may here be noticed that a steamship towing another vessel is a steamship within the meaning of the Steering and Sailing Rules; and that, so far as she is able, she is required to comply with Articles 15, 16, 17, 18, 19, 20, 21, 22, and 23 (*m*).

As to the meaning of "so as to involve risk of collision," see above, p. 349.

Classification of ships into meeting,

In the existing Regulations vessels approaching each other are described as "meeting" (*n*), "crossing," and

tention of sending his ship's head to port. The man at the helm, a Frenchman, carried out the order in the French custom, by putting his helm to port, and thereby caused the collision. Some nations, including America, Austria, and Italy, adopt the English system, others the French; with the Scandinavian nations, the practice is said to vary in different ships: see Naut. Mag. 1877, p. 340. Since pilots of one nation are frequently in charge of ships of another nation, it is manifest that a uniform system is very desirable. The apparent paradox involved in the English system originated with the use of the tiller, the movements of which are opposite to those of the ship's head. Most vessels being now steered by a wheel, and the tiller being frequently aft of the rudder-head, the orders to the helm are altogether anomalous. With a wheel, and a tiller aft of the rudder-head, the order to send the ship's head to starboard is still "port!" whilst the wheel, the tiller, and the ship's head all move together in the same direction, to starboard. It is stated (Naut. Mag. 1879, p. 216) that in most French ships the tiller chains are so rove that the wheel turns to port as the ship's head goes to starboard. From Sir H. Manwayring's Seaman's Dictionary (1644), it appears that the existing practice is at least as old as the early part of the 17th century. Probably, it has been the same since rudders and tillers were invented. It must be remembered that when going astern the action of the rudder is reversed, and that the order "port!" and corresponding movement of the rudder to starboard, send the ship's head to port.

Another source of confusion exists in the absence of a uniform system of orders to the helm given by the hand by the pilot or officer on the bridge. In some waters, the order to starboard the helm is given by extending the right hand, in others by extending the left.

(*m*) *The Independence* and *The Arthur Gordon*, Lush. 270; *infra*, p. 427.

(*n*) "Meets" in 17 & 18 Vict. c. 104, s. 296, see *infra*, p. 422, had a wider meaning than "meeting" in the existing Regulations: see *The Cleopatra*, Swab. 135; see also *The Inflexible*, Swab. 32, as to the application of sect. 296.

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crossing, and overtaking ships.

"overtaking," or being overtaken. It appears that this classification is intended to include all cases of ships approaching or being approached by others. It is a cross classification, for although no ship that is a "crossing" ship can at the same time come within the rule for "meeting" ships, yet a "crossing" ship may at the same time be an "overtaking" ship, and be bound by Article 20 (*o*).

Abolition of the rule of "port helm" except in one case.

The rule contained in Article 15 is not identical with the "port helm" rule of former Acts, or with the older practice of seamen mentioned in a former page (p. 340, above) (*p*). The existing Regulations limit the application of the "port helm" to one case only, namely, where both the ships are steamships (*q*), and they are proceeding in directly opposite directions on the same line, or nearly so. In every other case the "port helm" rule is inapplicable, and the two ships must act as required by the particular Article applicable to the case. There is reason to think that the important alteration of the law effected by the Regulations of 1863, and continued by those of 1880, has not produced a corresponding change in the practice of seamen. The proper application of the "port helm" rule in its existing shape requires the careful attention of seamen. Its indiscriminate application has been a fruitful source of collision.

Case of steamship making over the ground a course different from the direction of her head.

It appears from the explanatory part of Art. 15 that the application of that Article is determined, not by the directions in which two ships are approaching each other over the ground, but by the directions in which their heads are pointing. The case of a steamship crossing a tideway,

(*o*) See Arts. 14, 16, and 20. As to the distinction between "meeting" and "crossing" ships, see *The Franconia*, 2 P. D. 8; *The Princessan Lovisa* and *The Artemas*, Holt, 75; *The Eliza* and *The Orinoco*, *ibid.* 98; *The Superb* and *The Florence Bragington*, 2 Mar. Law Cas. O. S. 237; *The Peckforton Castle*, 3 P. D. 11; *The Breadalbane*, 7 P. D. 186; *The Seaton*, 9 P. D. 1; *The Columbia*, 10 Wall. 246.

(*p*) As to the application of the port helm rule of the M. S. A. 1854, see *The Arthur Gordon* and *The Independence*, Lush. 270; and see cases cited, pp. 423, 424.

(*q*) 17 & 18 Vict. c. 104, s. 296, applied to a steamship and a sailing ship: *The Ann*, Lush. 55.

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of a vessel dropping up stern foremost with the tide and guiding herself with her helm and anchor (*r*), or of a tug with a heavy ship in tow making considerable lee-way, so that she is approaching another vessel upon a course over the ground directly opposite to that of the other, but in a direction different from that in which her head is pointing, does not seem to be expressly provided for. It will be noticed that under the existing Regulations there is no "end on" rule for sailing ships, as there was under the Regulations (Art. 11) of 1863.

How much the course must be altered; both ships must port; neither need slacken after risk is determined.

"Altering her course to starboard" under Art. 15 means altering sufficiently to take her clear if the other ship does not starboard (*s*). The law is that both ships are to alter their courses to starboard, and the neglect by one to obey the law will be no excuse to the other, although there would have been no collision if one had ported (*t*). Where a ship is in a position to which Art. 15 applies, and she alters her course sufficiently to determine the risk of collision, she is not necessarily required at the same time to slacken under Art. 18 (*u*). There is, however, some obscurity as to the circumstances under which Art. 18 applies. It has been held to apply where there will be risk of collision if the vessels continue to approach each other (*x*).

If two steamships sight each other nearly right ahead, but so that each is a little on the starboard bow of the other, the law requires each to put her helm to port, although a collision would be avoided if each were to starboard, and that appears to be the safer and more convenient course. "It is essential that the law should be universally observed. If one obeys and the other does not,

(*r*) As in *The Smyrna*, mentioned *arguendo* in *The George Arkle*, Lush. 382.

(*s*) *The Jesmond* and *The Earl of Elgin*, L. R. 4 P. C. 1.

(*t*) See *The America*, 2 Otto, 432; *The Araxes* and *The Black Prince*, *infra*; *Little* v. *Burns*, 9 Court of Sess. Cas. 4th ser. 118.

(*u*) *The Jesmond* and *The Earl of Elgin*, *supra*.

(*x*) See *per* Brett, M.R., *The Beryl*, 9 P. D. 137, 141; *infra*, p. 442; and see *supra*, p. 348.

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the utmost confusion and danger will be introduced. A vessel which obeys the law has a right to trust that the vessel which she meets . . . . will obey it too, and she acts accordingly" (*y*).

What is "nearly end on"?

The meaning of "nearly end on" has not been exactly defined. Vessels upon parallel and opposite courses, each with the other nearly right ahead, and vessels upon courses making with each other an angle or two, or even three, points, were, before the interpretation of the term by Order in Council of the 30th July, 1868, held to be meeting "nearly end on" (*z*). But in a case where the courses of the two ships were within a point of being directly opposite (W.N.W. and S.E. by E.) the Privy Council decided that the ships were "crossing," and not "meeting" (*a*). In a case subsequent to the Order in Council, vessels upon courses within one and a half points of being directly opposite (S.S.W. and N.E. ½ N.) were held to be not end on (*b*). In another case (1870), two steamships going (*semble*) N.N.W. and S.E. were held to be "nearly end on" (*c*). And in a Scotch case, two vessels proceeding up and down the Clyde were held to be end on, each being about half a point on the starboard bow of the other (*d*).

These cases are not satisfactory. If two vessels are approaching each other upon opposite and parallel courses, and each sees the two side lights of the other, two miles off, one point upon her bow, they will pass clear by about

(*y*) *Per* Lord Kingsdown in *The Araxes* and *The Black Prince*, 15 Moo. P. C. C. 122; and see *The Cleopatra*, Swab. Ad. 135. These cases were under 17 & 18 Vict. c. 104, s. 296; see also *Little* v. *Burns*, *ubi supra*.

(*z*) *The Fruiter* and *The Fingal*, 2 Mar. Law Cas. O. S. 291; *The Kezia* and *The Victoria*, Holt, 70; *The Princessan Lovisa* and *The Artemas*, Holt, 75; *The Thames* and *The Stork*, Holt, 151; *The St. Cyran* and *The Henry*, Holt, 72.

(*a*) *The Constitution*, 2 Moo. P. C. C. 453.

(*b*) *The Rona* and *The Ave*, 2 Asp. Mar. Law Cas. 182.

(*c*) *The Jesmond* and *The Earl of Elgin*, L. R. 4 P. C. 1.

(*d*) *Little* v. *Burns*, *The Owl* and *The Ariadne*, 9 Sess. Cas. 4th ser. 118.

600 yards. The side lights of all vessels are visible across their bows to some extent, and of many to a very considerable extent. A change of lights from red and green to red alone, or to green alone, shows that Art. 15 does not apply. But a continuous showing of both red and green upon either bow within two points of right ahead would, it is submitted, justify the use of port helm. Art. 15.

It would seem that Art. 15 cannot apply to two ships rounding in opposite directions a promontory or a bend in a winding channel, and in such a position that the red light of one is opposed to the green of the other. But it is difficult to say how, in such a case, the ships are required to pass each other, and by what Article of the Regulations they are governed. It seems that the crossing rule (Art. 16) does not apply to them (*e*).

It should be noticed that there is no "end on" rule in force in the river Thames. The corresponding Article (Rule 22) of the Thames rules has a wider application than the Article under consideration (*f*).

Article 16 (*g*).

Art. 16.

Two ships under steam crossing.

If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side (*h*) *shall keep out of the way of the other.*

This Article is identical with Art. 16 of the Regulations of 1880, and with Art. 14 of the Regulations of 1863.

(*e*) See *The Velocity*, L. R. 3 P. C. 44; *infra*, pp. 427, 428.

(*f*) See *infra*, pp. 582, 585.

(*g*) Corresponding to Art. 19 of the Washington Conference Regulations.

(*h*) The Portuguese version of this Article is so worded as to have given rise to the contention that the vessel required to keep out of the way is the vessel from which the starboard side of the other is seen. There seems, however, to be no ground for this suggestion. The Article is clear as to the ship intended—*aquelle que vir o outro par estibordo*—and its meaning has been since authoritatively declared to be in accordance with that of the English version. See Parl. Paper, c. 3443, Sess. 1882, correspondence relating to the collision between *The Insulano* and *The City of Mecca*.

Art. 16. As to the meaning of "risk of collision," see above, p. 349; as to the distinction between "meeting," "crossing," and "overtaking" ships, see p. 458; as to how a ship is to "keep out of the way," see p. 411; and as to the duty of the ship which has the other on her port side to keep her course, see Art. 22, p. 471, below.

A vessel coming up with another astern or on her quarter may be at once "crossing" and "overtaking" her within the meaning of Arts. 16 and 20. Under such circumstances the "overtaking" rule (Art. 20) prevails, and it is clearly the duty of the faster ship, whether she has the other on her port or starboard side, to keep out of the way. This is clear from the case of *The Seaton* (*i*), the facts of which will be found stated below (*k*). The following observations of Butt, J., explain the combined effect of Arts. 16 and 20: "The corresponding Article (17) of the Regulations of 1863 (*i.e.*, corresponding to Art. 20 of the Regulations of 1880) seemed to have left a doubt in some cases as to the relative duties of ships, one of which was at once a crossing and an overtaking ship, and Art. 20 of the Regulations of 1880 was passed to remove such doubt. Therefore the overtaking, and not the crossing, rule is to prevail where there is any doubt. *The Polcevera* was clearly an overtaking ship, although she may have also been a crossing one. A vessel may be both overtaking and crossing, as when she is on an intersecting course, and is also overtaking the other vessel" (*l*).

It must not be inferred from these words that every "crossing" ship that is coming up with the other is an "overtaking" ship within the meaning of Art. 22. In *The Main* (*m*), and again in *The Imbro* (*n*), Butt, J., said that, to be an overtaking ship, she must be more than two points abaft the beam of the other. This was said with

(*i*) 9 P. D. 1.
(*k*) P. 459.
(*l*) *The Seaton*, 9 P. D. 1, 2.
(*m*) 11 P. D. 132; *supra*, p. 391.
(*n*) 14 P. D. 73, 77; *supra*, p. 393.

reference to Art. 11, but the word (overtake) would probably be held to have the same meaning in Art. 22. Art. 16.

A tug or a steamship with a vessel in tow (*o*), and a steamship lying-to under canvas with her steam up, is a ship under steam within the meaning of this Article (*p*).

Art. 16 applies in narrow channels, as well as at sea, and although some other Article (*e.g.*, Art. 21, the starboard side rule) is applicable at the same time (*q*). In narrow channel.

There have been some important decisions as to the application of the "crossing" rule in winding rivers. The steamship *Carbon*, coming up the Thames on the flood-tide, and rounding a point where the river turns to starboard, under a port helm, saw a little on her starboard bow the masthead and red lights of *The Velocity*, a steamship coming down the river. In that part of the river it is usual for ships bound down to keep near the north shore. It was held that the ships were not "crossing" ships, and that *The Carbon* was wrong in porting and attempting to pass to the north of *The Velocity*. It was held by the Privy Council that the duty of each ship was to continue her course round the point in the usual track, in which case they would have passed clear (*r*). Application of Art. 16 in a winding river.

The case of *The Velocity* was decided upon the general or sea Regulations of 1863, and before any special rules for the Thames were in force. According to this case, it appears that in winding rivers, and channels where no special rules are in force, two ships on opposite sides of a point, and rounding the bend, are not always, or for that reason alone, "crossing" ships. But it is not clear that this decision would be followed where the "crossing" rule has been in terms enacted for the regulation of navi-

(*o*) See *The Independence* and *The Arthur Gordon*, Lush. 270.
(*p*) *The Jennie S. Barker*, 3 Asp. Mar. Law Cas. 42; *supra*, p. 359.
(*q*) *The Leverington*, 11 P. D. 117.
(*r*) *The Velocity*, L. R. 3 P. C. 44. See also *The Cologne* and *The Ranger*, L. R. 4 P. C. 519; *The Esk* and *The Niord*, L. R. 3 P. C. 436; and the observation of James, L.J., on *The Velocity* in *The Oceano* and *The Virgo*, 3 P. D. 60.

Art. 16.

gation in a winding river. In another case, decided under the Thames rules, which contained an Article identical in terms with Art. 16 of the general Regulations, a steamship proceeding up the river, against an ebb tide, and in a reach of which the direction is S.W., was crossing the channel obliquely in order to clear a ship in her path. Whilst so doing, there was, on her starboard side, and in the reach above her, of which the direction is about W.N.W., another steamship coming down. The collision occurred about the meeting of the two reaches. It was held by the Court of Appeal that the ships were crossing ships, and that it was the duty of the vessel bound up the river to keep out of the way (*s*).

A steamer bound for Penarth Dock, and showing the usual docking signal, was held not to be relieved from the duty of keeping out of the way of another steamer which was coming down Cardiff drain on her starboard bow (*t*).

Where two steamships are approaching from different directions a buoy, lightship, headland, or other point at which each must in the ordinary course of navigation alter her course, and before either of them rounds the point they are upon courses which, if continued, will intersect, it is doubtful whether they are crossing ships within Art. 16 (*u*). It would seem that the Article assumes that the two ships will in the ordinary course of navigation continue upon intersecting courses until they clear each other. But it has been held to apply where one of the ships was in Cardiff drain and the other was in the entrance channel to the Roath basin (*x*). These are two narrow cuts, running in N.N.E. and N.E. directions, through the mud off

(*s*) *The Oceano* and *The Virgo*, 3 P. D. 60. See also as to the duty of two ships rounding a bend in a river, one outside the other, *The Bywell Castle*, 4 P. D. 219.

(*t*) *The St. Audries*, 5 Asp. Mar. Cas. 552.

(*u*) The question was raised, but not decided, with reference to vessels passing the Newarp lightship, off Yarmouth, in *The Edgworth*, 17th Nov. 1885.

(*x*) *The Leverington*, 11 P. D. 117.

Cardiff docks, and they join or intersect at the angle above mentioned. This seems a strained application of Art. 16, but there is no doubt as to the meaning and effect of the decision (*y*). Art. 16.

A steamship, *The Cayuga*, after coming out of her dock in New York harbour, and straightening herself down the river, was heading S.S.W. At the same time *The James Watt*, another steamship, was coming up on a S. by E. course abaft the beam of *The Cayuga* on her starboard quarter, and overtaking her. It was held by the Supreme Court of the United States that they were crossing ships, and that *The Cayuga* was in fault for not keeping out of the way of *The James Watt* under Art. 14 of the Regulations of 1863 (*z*). This case, it is submitted, would not be followed in this country (*a*); and it seems to be inconsistent with other American decisions (*b*).

Article 17 (*c*).

If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship. Art. 17. Sailing ship and ship under steam.

This Article is identical with Art. 17 of the Regulations of 1880, and with Art. 15 of the Regulations of 1863.

As to "risk of collision," see above, p. 349; as to how to "keep out of the way," see pp. 411, 471; and as to the duty of the sailing ship to keep her course, see Art. 22.

(*y*) Lord Esher, M.R., by way of illustration of a case in which Art. 16 applies, suggested the case of two ships rounding Grain Spit at the junction of the Thames and Medway.

(*z*) *The Cayuga*, 14 Wall. 270. According to the definition proposed by Brett, L.J., in *The Franconia*, 2 P. D. 8, *The James Watt* was an "overtaking" ship, and bound to keep out of the way of *The Cayuga*.

(*a*) See *The Seaton*, 9 P. D. 1.

(*b*) See *The Oceanus*, 5 Bened. 545; *The Grosvenor*, Abbot, Ad. 108; *The Rhode Island*, Olcott, 505; 1 Blatchf. 363.

(*c*) Corresponding to Art. 20 of the Washington Regulations.

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A steamship may "keep out of the way" of the other vessel in any way she thinks fit. She may go ahead, astern, or on either side of the other. "Give way" in the Trinity House Rules of 1840 had a narrower meaning, and required the ship which had to "give way" to pass under the stern of the other (*d*).

A steamship hove-to under canvas with her steam up would, it is submitted, be held to be "proceeding" within the meaning of Art. 17 (*e*); and also a sailing ship in a flat calm.

Reason of the rule that a steamship must keep out of the way.

The reason of the rule of Art. 17 is said to be that a steamship is more completely under command than a sailing ship. She can go ahead in the teeth of the wind, and she can stop or go astern, as she pleases (*f*). This, however, is true only to a limited extent in the case of a tug with a ship in tow; and in approaching her the other ship must take her encumbered condition into consideration (*g*). In America a schooner was held in fault for not holding herself in stays to allow a tug with a fleet of barges in tow to pass (*h*). But the tug is a steamship within the meaning of Art. 17, and must comply with that Article, so far as she can (*i*). In narrow waters it is frequently dangerous for a long and heavy steamship to keep out of the way, where the sailing ship can do so without difficulty. But, if it is possible, the law requires the steamship to keep out of the way.

Duty of a steamship meeting, crossing, and overtaking a sailing ship.

The duty of the steamship under Art. 17 is the same, whether the sailing ship is close-hauled or free, and whether she is on the port or starboard tack. If the steamship is crossing the course of the sailing ship, and at the same

(*d*) See *The Rose*, 2 W. Rob. 1.

(*e*) See *The Jennie S. Barker*, 3 Asp. Mar. Law Cas. 42; *The Sunnyside*, 1 Otto, 208. *The Byron*, *supra*, p. 415. *The Helvetia*, 3 Asp. Mar. Law Cas. 43 (note), would probably not be followed.

(*f*) *The Arthur Gordon* and *The Independence*, Lush. 270.

(*g*) *The Arthur Gordon*, *supra*; *The Gala* and *The Zenobia*, Holt, 112.

(*h*) *The W. C. Redfield*, 4 Bened. 227.

(*i*) See *supra*, p. 185.

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time overtaking her, she is required to keep out of the way by Art. 20 as well as by Art. 17. If she is meeting the sailing ship end on, or nearly end on, she is not required by the Regulations to pass on one side rather than the other; she may "keep out of the way," under Art. 17, as she thinks best. If she is being overtaken by the sailing ship, it appears that, by the operation of Art. 20 and Art. 22, she is required to keep her course (*k*).

Difference between Art. 17 and the old rule of "port helm."

The difference between the rule contained in Art. 17 and the old rule of "port helm" should be observed. In the case of a sailing ship with the wind free meeting a steamship end on, her duty is to keep her course, and not, as has been supposed, to put her helm to port (*l*).

Heavy obligation of Art. 17 on steamships.

The obligation which Art. 17 throws upon a steamship in every case where there is risk of collision with a sailing ship, is heavy. "It is the duty of a steamer, where there is risk of collision, whatever may be the conduct of the sailing vessel, to do everything in her power that can be done, consistently with her own safety, in order to avoid collision" (*m*). At the same time, "When a steamer is condemned for having omitted to do something which she ought to have done, it seems just to require proof of three things: first, that the thing omitted to be done was clearly in the power of the steamer to do; secondly, that, if done, it would in all probability have prevented collision; and, thirdly, that it was an act which would have occurred to any officer of competent skill and experience in command of the steamer" (*n*). It follows from this that the mere fact that a ship required to keep out of the way has been in collision is not evidence of negligence on her part.

The duty of the steamship has been thus defined by the

(*k*) Under the Regulations of 1863, there was a doubt as to the duty of a steamship being overtaken by a sailing ship: see *The Philotaxe*, 3 Asp. Mar. Law Cas. 512.

(*l*) *The Bougainville* and *The Jas. C. Stevenson*, L. R. 5 P. C. 316.

(*m*) *Per* Westbury, C., in *Inman* v. *Beck*, *The City of Antwerp* and *The Friedrich*, L. R. 2 P. C. 25, 30, 34.

(*n*) *Per* Westbury, C., *ibid.*

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Supreme Court of the United States: "The Rules require, when a steamship and sailing vessel are approaching from opposite directions or on intersecting lines, that the steamship, from the moment the sailing vessel is seen, shall watch with the highest diligence her course and movements, so as to be able to adopt such timely measures of precaution as will necessarily prevent the two boats coming in contact" (*k*).

And of a tug with a heavy ship in tow.

The fact of a tug having a heavy ship in tow, and a strong head wind against her, does not justify the tug in departing from Art. 17, and neglecting to keep out of the way of a sailing ship (*l*). A steamship of 1,356 tons was held in fault for not keeping out of the way, although she had in tow a disabled vessel of 1,495 tons, with a long scope of tow rope, so that the towage was a service of difficulty (*m*).

Steam trawler with trawl down.

But the case is otherwise with a steam trawler. A steam trawler with her trawl down, going one or one and a half knots through the water (*n*), and carrying on her mast the two lights prescribed by Order in Council of 30th Dec., 1884 (*o*), saw a sailing ship approaching her so as to involve risk of collision. It was held by Butt, J., that the carrying her lights on her mast, and not side lights, indicated, as the fact was, that she had little power of keeping out of the way, and that Art. 23 applied, so as to prevent the application of Art. 17. The sailing ship was held to be alone in fault for the collision, though the trawler did nothing to keep out of the way (*p*).

Duty of the sailing ship.

The duty of the sailing vessel is to keep the course upon which she was when the other vessel was sighted; but where a sailing ship, when at a distance of two miles from

(*k*) *The Carroll*, 8 Wall. 302, 306; *The Lucile*, 15 Wall. 676. *The Falcon*, 19 Wall. 75, is to the same effect.

(*l*) *The Warrior*, L. R. 3 A. & E. 553.

(*m*) *The American* and *The Syria*, L. R. 6 P. C. 127.

(*n*) This is clear from the facts.

(*o*) See above, p. 382.

(*p*) *The Tweedsdale*, 14 P. D. 164.

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the steamship, altered her helm slightly, it was held that she was not therefore in fault for the collision (*q*). The mere fact that a steamer is taking no step to keep out of the way, will not cast upon the sailing ship the duty of manœuvring, for the steamer is able to manœuvre and keep out of the way even when the sailing ship is very close to her (*r*). But in the Thames, in a case where it was unsafe and impracticable for a steamer to keep out of the way of a sailing barge, and the steamer gave the signal prescribed by Art. 21 of the Thames Byelaws, the barge was held to blame for not keeping out of the way (*s*).

A sailing ship in a fog, being aware of the proximity of a steamship under way, will not be held free from blame if she simply keeps on her course and does nothing. It is her duty to be on the alert, with her people stationed at the sheets and braces ready to let them fly and haul the yards, if necessary, so as to assist the helm in case the steamship comes into view at so short a distance that a collision can be avoided only by action on the part of the sailing ship (*t*).

Cases illustrating Art. 17.

A sailing ship, turning to windward in the Thames, went about when she got to the edge of the tide, without giving any notice to a steamship astern of her. The steamship was held solely in fault for a collision which followed (*u*).

A barque, rounding-to before coming to an anchor, was held not to be in fault for a collision with a steamship, although the steamship alleged that she was baffled by the rapid change of the barque's lights, and that the collision was caused by the barque's departure from the rule requiring her to keep her course (*x*).

(*q*) *The Norma*, 3 Asp. Mar. Law Cas. 272.

(*r*) *The Highgate*, 62 L. T. N. S. 841.

(*s*) *The Long Newton*, 6 Asp. M. C. 302.

(*t*) *The Zadok*, 9 P. D. 114, 118.

(*u*) *The Palatine*, 1 Asp. Mar. Law Cas. 468.

(*x*) *The Monsoon*, v. *The Neptune*, 2 Mar. Law Cas. O. S. 289; Holt, 186.

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But a sailing ship must not go about at an improper time or place, so as to embarrass the steamship (*y*).

Where a steamship was crossing the English Channel at twelve knots an hour, and ran down a sailing ship with her lights burning and obeying the Regulations, it was said by the Court that she must be in fault. If it was thick, she was in fault for going so fast; and if it was fine, she was bound to see and avoid the other ship (*z*).

Article 18 (*a*).

Art. 18.

Steamship to slow or reverse engines if necessary.

Every steam-ship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, or stop and reverse, if necessary.

This Article answers to Art. 18 of the Regulations of 1880, and is identical with it. It is almost identical with Art. 16 of the Regulations of 1863; the direction in the latter as to speed in a fog being omitted from the present Art. 18, and forming part of Art. 13 of the existing Regulations.

Apart from the Regulations, it would be negligence if a steamship, having the opportunity to do so, failed to stop and reverse, "if necessary" (*b*); and Art. 18 appears to be little more than a declaration of the law in this respect (*c*). But it will be seen below that an infringement of the Article may cause a ship to be held in fault for a collision, although it did not in fact cause or contribute to it, and although there was no actual negligence.

(*y*) *The General Lee*, 3 Mar. Law Cas. O. S. 204 (Irish case); *The Potomac*, 8 Wall. 590; and see *infra*, p. 477, as to the duty of a sailing ship to beat out her tack.

(*z*) *The Samphire* and *The Fanny Beck*, Holt, 193.

(*a*) Corresponding to Art. 23 of the Washington Regulations, which, however, applies only to steam vessels required to keep out of the way.

(*b*) See *The Birkenhead*, 3 W. Rob. 75; *The James Watt*, 2 W. Rob. 270; *The Vivid*, 7 Not. of Cas. 127.

(*c*) See *per* Lord Halsbury, C., in *The Ceto*, 14 App. Cas. 670, 673; *per* Lord Bramwell, *ib.* p. 689.

Art. 13 cannot be broken without at the same time breaking Art. 18 (*d*). Art. 18.

The requirement of Art. 18 is that a vessel, when approaching another with risk of collision shall, whatever her speed may then be, slacken it, if possible; and, at the same time or afterwards, if necessary, stop and reverse (*e*). This, it is submitted, is the meaning of the Article, though the construction is not altogether clear; for the position of the words "if necessary" admit of their being read with, and as a qualification of, the direction to "slacken," as well as of the direction to "stop and reverse." In *The Ceto*, it was assumed by the learned lords (*f*) who referred to the point, that the word "necessary" applied only to stopping and reversing. The necessity which the Article speaks of is the necessity of avoiding risk of collision (*g*). "Necessary" does not mean that the situation is such that without stopping and reversing a collision would take place; it means rather prudent or expedient (*h*). Necessity exists, if "the circumstances are such as to convey to the mind of a skilled seaman that risk of collision is so imminent as to make it indispensable to stop and reverse" (*i*).

A steamship in a fog so dense that a vessel could not be seen her own distance off, hearing the whistle of another continually approaching, was held in fault for not reversing until the other vessel was seen (*k*). But the decisions cited below show that the direction to "reverse if necessary" is not confined to cases of imminent danger such as this.

In *The Ceto* (*ubi supra*), Lord Fitzgerald seems to have been of opinion that, where risk of collision exists, for a ship without necessity to stop and reverse so as to bring Necessity must be apparent.

(*d*) *Per* Lord Esher, M. R., *The Ebor*, 11 P. D. 25.
(*e*) See *The Beryl*, 9 P. D. 137, 145.
(*f*) Lords Selborne, Watson, Fitzgerald.
(*g*) *Per* Lord Watson, *The Ceto*, 14 App. Cas. 670, 684.
(*h*) *Per* Lord Bramwell, 14 App. Cas. 689.
(*i*) *Per* Lord Fitzgerald, *ibid.* p. 690; and see *per* Lord Herschell, *ib.* p. 694.
(*k*) *The Dordogne*, 10 P. D. 6.

Art. 18. herself to a standstill is negligence (*l*). It is submitted that no such general rule can be laid down, though under certain circumstances the manœuvre may be wrong.

In *The Beryl* (*m*), Bowen and Fry, L. JJ., questioned whether the words "if necessary" mean "if it is actually necessary," or, "if the officer in charge should reasonably think that a necessity has arisen." In *The Celo* (*n*), it was held that the latter interpretation is the correct one (*o*). The exigency of the rule is there defined by Lord Watson (*p*): "In broad daylight, or at night time, so long as a ship's lights are discernible at a moderate distance I do not think that it is, within the meaning of the rule, 'necessary' for two approaching steamers to stop and reverse until it becomes apparent to the eye that if they continue to approach they will in all likelihood either shave close or collide. When approaching vessels are enveloped in a fog and cannot see each other, the rule must, in my opinion, apply with greater stringency." After describing the uncertainty which always exists as to the distance, position, and course of a steamship in a fog, whose presence is known only by the sound of its whistle, Lord Watson proceeds: "When two steamships, invisible to each other, by reason of a thick fog find themselves gradually drawing nearer until they are within a few ships' lengths, they are, in my opinion, within the second direction of rule 18, and each of them ought at once to stop and reverse, unless the fog signals of the other vessel have distinctly and unequivocally indicated that she is steered on a relatively safe course and will pass clear without risk of collision."

So Lord Herschell (*q*): "The necessity must not be such as to become manifest only when all the facts are ascertained. It must be such as would be apparent to a seaman

(*l*) 14 App. Cas. 670, 693.
(*m*) 9 P. D. 137, 144.
(*n*) 14 App. Cas. 670.
(*o*) See the judgment of Brett, M. R., in *The Beryl*, *ubi supra*; and in *The Dordogne*, 10 P. D. 6.
(*p*) *Ibid.* p. 686.
(*q*) *Ibid.* p. 694.

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of ordinary skill and prudence with the knowledge which he possesses at the time." Lord Esher, M. R., had previously expressed the same opinion: "When you speak of rules that are to regulate the conduct of people, those rules can only apply to circumstances which must or ought to be known to the people at the time. You cannot regulate the conduct of people as to unknown circumstances" (*r*).

Whether Art. 18 applies in all waters.

As pointed out above (Art. 18), it will probably be held to apply in rivers, harbours, and other narrow waters, as well as at sea; and that in waters where local rules of navigation are in force it supplements the local rules, and must be read and obeyed in conjunction with them, so far as possible. In a Scotch case it was held to apply in the Clyde, where local rules are in force (*s*).

Effect of non-compliance with Art. 18; 36 & 37 Vict. c. 85, s. 17.

In consequence of a leading decision of the House of Lords (*t*), it is of the highest importance that the construction and application of Art. 18 should be properly understood. Like the other Steering and Sailing Rules, it must be read in conjunction with Art. 23; but although that Article has been held to justify a steamship in not stopping and reversing where keeping on is the one only chance of avoiding collision, the officer who elects not to stop and reverse his engines, where there is risk of collision, takes upon himself a heavy responsibility. The requirements of the law in this matter can only be appreciated by a careful examination of the cases.

The Jesmond and *The Earl of Elgin.*

It was held by the Privy Council that the corresponding Article (Art. 16) of the Regulations of 1863 applied only "when there is a continuous approaching of the two ships;" that Art. 13 and Art. 16 (of the Regulations of 1863) were to be read together; that, so reading them, it was evident

(*r*) *The Beryl*, 9 P. D. 137, 138. These words were quoted with approval by Lord Herschell in *The Theodore H. Rand*, 12 App. Cas. 250; and by Lord Fitzgerald in *The Ceto*, 14 App. Cas. 670, 691.

(*s*) *Little* v. *Burns*, *The Owl*, and *The Ariadne*, 9 Sess. Cas. 4th ser. 118.

(*t*) *The Voorwaarts* and *The Khedive*, 5 App. Cas. 876; see below, p. 440.

Art. 18. that the duty to slacken or stop and reverse under Art. 16 did not necessarily arise at the same moment Art. 13 became applicable; and that if two ships, approaching each other under circumstances such that the "meeting" rule is applicable, port their helms so that there is no longer risk of collision, Art. 18 never becomes applicable, and there is no duty on either ship to slacken, or to stop and reverse (*t*).

This seems to be the effect of the decision in *The Jesmond* and *The Earl of Elgin*. The facts in that case were as follows:—*The Jesmond* was a screw steamship of 589 tons register, in water ballast. *The Earl of Elgin* was a screw steamship of 608 tons register, with a cargo of coals on board. Each ship sighted the other in the open sea at a distance of a mile and a half. They were approaching each other at a joint speed of eight or nine miles an hour, on courses nearly opposite, and nearly end-on within the meaning of Art. 13 of the Regulations of 1863. *The Jesmond* put her helm to port and brought red to red. She did not slacken her speed, or stop or reverse her engines. It was contended that she ought at the moment when she ported to have slackened her speed. It was held by the Privy Council that, having ported and brought red to red, the original risk of collision was determined, and that she was under no obligation then or afterwards to slacken her speed under Art. 16 (of the Regulations of 1863). This case was followed by the Privy Council in *The Rhondda* (*u*).

The Rhondda. The circumstances of that case were as follows:—The steamship *Rhondda* rounding Faro Point from the westward, to enter the Straits of Messina, saw the mast-head and red lights of *The Alsace Lorraine* on her starboard bow, distant about a mile. Her helm was put hard-a-port.

(*t*) *The Jesmond* and *The Earl of Elgin*, L. R. 4 P. C. 1; and see *The Milwaukee*, Brown, Ad. 313 (Amer. case).

(*u*) 8 App. Cas. 549.

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No order was given to the engines, which were going full speed ahead. The vessels were approaching each other at a combined rate of fifteen miles an hour. Owing to a current, or eddy tide, taking the ship on her starboard bow, she did not properly answer her helm. As soon as this was perceived her engines were stopped and reversed. It was held by the Privy Council that *The Rhondda* was not in fault by the rule laid down in *The Khedive* (*x*), for not stopping and reversing, when the other ship was first seen. If *The Rhondda* had answered her port helm, the risk of collision would have been determined, and, according to the interpretation of Art. 16 of the Regulations of 1863 (answering to Art. 18 of the existing Regulations), she was under no obligation to slacken her speed or to stop and reverse. It was only when the failure of her port helm manœuvre became apparent that the duty to stop and reverse arose. She did then stop and reverse, and was therefore free from blame. In the words of Lord Watson in *The Khedive*, it was a case where Art. 16 "could not reasonably be held to apply before the moment at which it was actually obeyed" (*y*).

There is some difficulty in reconciling *The Beryl* decided by the Court of Appeal with the decisions in *The Jesmond* and *The Rhondda*. In *The Jesmond* it was held that the "meeting" and the "stopping and reversing" rules (Arts. 13 and 16 of the Regulations of 1863), were to be read together; in *The Beryl*, Brett, M.R., held that the corresponding Regulations of 1880 (Arts. 16 and 22) were wholly independent of the stopping and reversing rule (Art. 18). He held that Art. 18 "does not in any way modify, clash with, or require to be construed at the same time as, the other rules." It is, he said, a wholly independent rule. It applies, like the other rules, at the moment before risk of collision exists, when the position

(*x*) 5 App. Cas. 876. (*y*) 5 App. Cas. 902.

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and action of two steamships is such as to involve risk of collision. "It must apply if the circumstances are such that an officer of ordinary skill and care would be bound to come to the conclusion that, if the ships continue to approach each other, there will be risk of collision" (*z*). It does not appear that either *The Jesmond* or *The Rhondda* was cited in *The Beryl*; and it may be doubted whether the interpretation placed upon the "stopping and reversing" rule in *The Jesmond* is not preferable to that adopted in *The Beryl*. The latter case has, however, been followed in the Court of Appeal and House of Lords (*a*).

The Beryl.

In *The Beryl* it was not held that the duty to stop and reverse, on the part of the one ship, arose at the same moment as the duty to take steps to keep out of the way, on the part of the other ship. On the contrary, Brett, M.R., held that, after it became the duty of *The Abeona* to take precautions, *The Beryl* was not wrong in continuing her course. But before the vessels came within 300 yards of each other (when the collision was inevitable) Art. 18 came into operation, and *The Beryl* was in fault for not having stopped and reversed.

The Voorwaarts and *The Khedive.*

The distinction between *The Jesmond* and *The Khedive*, subsequently decided by the House of Lords, should be noted. The facts in *The Khedive* were as follows:—*The Khedive* and *The Voorwaarts* were two ocean steamships of 3,740 and 3,000 tons register respectively. They were proceeding off the coast of Penang at full speed upon nearly parallel and opposite courses, each having the other on her starboard bow, green light to green light. When they were from half to three-quarters of a mile apart *The Voorwaarts* suddenly ported, showing her red to *The Khedive*, and thereby caused risk of collision. The helm of *The Khedive* was put hard-a-starboard. This was held to be a right manœuvre. At the same time the order was

(*z*) *Per* Brett, M.R., 9 P. D. 141. *The Memnon*, 59 L. T. N. S. 289;
(*a*) *The Dordogne*, 10 P. D. 6; 62 *ib.* 84.

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given to stand by her engines; a minute and-a-half afterwards the engines were stopped and reversed; one-and-a-half minutes after this the collision occurred. By not slackening her speed or stopping and reversing when the red light of *The Voorwaarts* came into view *The Khedive* infringed Art. 16 (of the Regulations of 1863). The House of Lords held her in fault under 37 & 38 Vict. c. 85, s. 17. The Court of Appeal had gone into the question whether, having regard to the suddenness of the peril caused by *The Voorwaarts'* change of course, the captain of *The Khedive* had shown want of proper care, skill or nerve in not giving the absolutely right order to the engines for a minute and-a-half after *The Voorwaarts'* red light came into view; the House of Lords held that, having deliberately elected to keep his engines going ahead full speed, and not to stop and reverse, he had infringed the Regulations, and was therefore in fault under 36 & 37 Vict. c. 85, s. 17 (*b*).

The Benares.

There is difficulty in reconciling the decision in *The Benares* (*c*), a case subsequently decided by the Court of Appeal, with some of the *dicta* of the learned lords who addressed the House in *The Khedive*, and even with the principle upon which the decision in the latter case appears to be founded. But *The Khedive* was before the Court of Appeal in *The Benares*, and the intention of the Court was to decide nothing contrary to *The Khedive*. That case was distinguished as depending upon special and different circumstances. The circumstances differed in this: that in *The Khedive* the not stopping and reversing was wrong, as matter of seamanship, and probably contributed to the collision (see 5 App. Cas. 898, 899); whereas in *The Benares* the departure from the Regulations was "the one chance still left of avoiding danger which was otherwise inevitable." The manœuvre adopted—keeping on at

(*b*) See further as to this case, *supra*, p. 47.

(*c*) 9 P. D. 16.

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full speed—though unsuccessful, was held to be necessary within the meaning of Art. 23, and therefore in accordance with the law.

At first sight *The Khedive* seems to decide that a steamship will always be held in fault if, having an opportunity to stop and reverse, and not being compelled to keep on by danger other than that of collision, she does not stop and reverse before the collision occurs. But although there are *dicta* in that case pointing to such a conclusion, the decision as applied to the facts of the case does not go so far. If the circumstances are such that departure from Art. 18 was necessary within the meaning of Art. 23, a ship will not be held to be in fault though she does not stop or reverse before the collision. Such circumstances existed in *The Benares*. A steamship, *The Gerarda*, going seven knots, saw a green light a point on her port bow distant about three-quarters of a mile. Her helm was put to starboard, and very shortly afterwards *The Benares* was seen with her port side open and showing no red light. The helm of *The Gerarda* was put hard-a-starboard and the engines kept on full speed. *The Benares* struck *The Gerarda* on her starboard side. It was found that the first starboarding of *The Gerarda* was not wrong, and that after seeing *The Benares'* port side the only chance of escaping collision was for *The Gerarda* to hard-a-starboard and keep on at full speed, as she did. It seems therefore, that not to stop and reverse when a collision is in fact inevitable, but in the reasonable opinion of the person in charge may possibly be avoided by keeping on full speed, is not an unnecessary departure from the Regulations.

The Beryl.

The case of *The Beryl* was as follows:—*The Abeona* and *The Beryl* were steamships crossing at right angles, *The Abeona* having *The Beryl* on her starboard hand. *The Beryl*, when some considerable distance off, whistled twice, and, when from a quarter to half a mile off, eased her engines. At this time *The Abeona* ought to have, but had

not, stopped or reversed her engines, or altered her course. Then she eased her engines. If she had not eased there would have been no collision; but by easing she "counteracted *The Beryl's* manœuvre." When the vessels were so close that a collision was inevitable—about 300 yards apart (*d*)—both stopped and reversed. It was held by Butt, J., that *The Abeona* had been wrongly manœuvred from first to last, and that *The Beryl* had been "properly navigated according to the Regulations" (*e*). It will be observed that *The Beryl* did not reverse her engines until the collision was inevitable. Upon appeal the decision of Butt, J., as to *The Beryl*, was reversed. The Court of Appeal held unanimously that the duty of *The Beryl*, under Art. 18, was not fulfilled by slackening her speed at the time of her whistling the second time; and that her duty was to have stopped and reversed her engines at some time between the second whistling and the moment at which the collision became inevitable.

The Memnon.

In the case of *The Memnon* (*f*), that vessel was held to blame for a collision with *The San Salvador*. They were steamships crossing nearly at right angles, and *The San Salvador*, though she had *The Memnon* on her own starboard bow, took no step to avoid collision until she was within three ships' lengths of her, when she starboarded. The course and speed of *The Memnon* were such that, had *The San Salvador* kept her course, *The Memnon* would have passed ahead of her without collision, and *The Memnon* stopped her engines as soon as *The San Salvador* starboarded. It was held that *The Memnon*, as well as *The San Salvador*, was to blame; that those on board her were not justified under the circumstances in assuming that *The San Salvador* would do what was right; that they

(*d*) See the report of the case on appeal, 9 P. D. 137, 142.

(*e*) 9 P. D. 4.

(*f*) 6 Asp. M. C. 317. In Dom. Proc. 62 L. T. N. S. 84. This case is referred to more fully *ante*, p. 52.

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ought to have seen that the courses of the two vessels were involving risk of collision, and accordingly that they ought to have complied with Art. 18 earlier than they did.

The Arratoon Apcar.

A steamship, A., by porting to another, B., that was approaching her with all her lights showing, shut in the green light of B.; but B. by perverse starboarding brought her green again into view; thereupon A. again ported and shut in B.'s green; B., continuing to starboard, again brought her green into view, and a collision followed. It was held, under 37 & 38 Vict. c. 85, s. 17, that A. was in fault for not having stopped and reversed before the collision (*g*).

The Stanmore.

In *The Stanmore* the duty to stop and reverse, and not to stop only, was insisted upon. There the alteration of the other ship's course at the distance of a quarter of a mile was indicated by the apparent closing of the mast head and side light (*h*).

The Thames and *The Lutetia.*

In *The Thames* and *The Lutetia* a vessel was held in fault for not having stopped and reversed "when the risk of collision must have been apparent" (*i*).

So, in America, where two steamships, *The C.* and *The M.*, were approaching one another on nearly parallel opposite, but slightly converging lines, and in a position to pass clear, *The C.* ported and ran across *The M.*, rendering collision imminent, and *The M.* did not slacken, signal, or reverse till after the porting of *The C.* It was held that *The M.* as well as *The C.* was to blame, the Court saying that there was such uncertainty in the movements of *The C.* as called for the closest watch and the highest diligence (*j*).

(*g*) *The Arratoon Apcar*, 15 App. Cas. 37.

(*h*) *The Stanmore*, 10 P. D. 134. As to the closing of the lights indicating a change of course, see above, p. 350.

(*i*) *McLaren* v. *Compagnie Française de Navigation à Vapeur, The Thames* and *The Lutetia*, 9 App. Cas. 640, 651.

(*j*) *The Manitoba*, 15 Davis U. S. 97.

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Where A., a steamship rounding Tilbury Ness in the Thames, under a port helm, was approaching B. on the other side of the point in such a position that, if she had not been under a port helm, there would have been risk of collision, it was held by Brett, L. J., that it was not A.'s duty to stop and reverse under the Thames Rule No. 14, which is very similar in terms to Art. 18 (*k*). *The Libra.*

The application of Art. 18 to a steamship hearing the fog-horn or whistle of another ship in a fog, is illustrated by the following cases:— Application of Art. 18 in a fog.

The Kestrel was a loaded steamship of 392 tons register, and *The Frankland* a loaded steamship of 541 tons register. *The Frankland* was at sea, going at a moderate speed, in a thick fog, on a S.S.E. course. She heard a whistle sounded many times, indicating that a steamship (*The Kestrel*, on a N.N.W. course) was approaching, and had come very near to her—so near, that if the vessels had then stopped, they would have been within hailing distance. It appears that when she first heard *The Kestrel's* whistle she stopped her engines, and that she did not reverse them until *The Kestrel's* red and mast-head lights were seen about a ship's length off a point on the starboard bow. It was held that *The Frankland's* engines should, in compliance with Art. 16 of the Regulations of 1863, have been not only stopped, but reversed, so as to bring the ship to a standstill as soon as the approaching whistle indicated that the ships were within hailing distance (*l*). *The Frankland* and *The Kestrel.*

In *The Love Bird* (*m*), a steamship in a thick fog, going three knots, heard the blast of a fog-horn nearly ahead. She was held in fault for not having stopped or reversed her engines until the other vessel was seen about a length off. *The Love Bird.*

In *The Kirby Hall* (*n*), a steamship in a very dense *The Kirby Hall.*

(*k*) 6 P. D. 139.
(*l*) *The Frankland* and *The Kestrel*, L. R. 4 P. C. 529.
(*m*) 6 P. D. 80.
(*n*) 8 P. D. 71.

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fog was held in fault for not stopping her engines and bringing herself to a standstill, as soon as she heard the whistle of another steamship in close proximity. The decision in this case went further than the facts of the case required. The fact was, that *The Kirby Hall* heard the whistle of the other ship, *The City of Brussels*, twice, on the port bow, the second blast being nearer than the first. The engines were not stopped until the whistle was heard the second time and the mast-head light of *The City of Brussels* was seen nearly right ahead, distant from one to two ships' lengths.

The Harton. A steamship sighting a barge at anchor in the Thames without a light, and at a distance of a ship's length, stopped her engines, but did not reverse them. Butt, J., expressed his opinion that she ought to have reversed her engines upon the barge being reported (*o*).

The John M'Intyre. A steamship in a dense fog, hearing a whistle on her port bow, slackened her speed; she heard the whistle again, and nearer to her. It was held that she was in fault under Art. 18 for not stopping and reversing upon hearing the whistle the second time. In this case Brett, M. R., said: "It may be laid down as a general rule of conduct that it is necessary to stop and reverse, not indeed every time that a steamer hears a whistle or fog-horn in a dense fog, but when in such a fog it is heard on either bow and approaching, and is in the vicinity; for then there must be risk of collision" (*p*). Lord Herschell, in *The Ceto* (*q*), used similar language: "I think when a steamship is approaching another vessel in a dense fog she ought to stop, unless there be such indications as to convey to a seaman of reasonable skill that the two vessels are so approaching that they will pass well clear of one another." And Sir James Hannen, in *The Rosetta* (*r*), held that the

(*o*) *The Harton*, 9 P. D. 44.
(*p*) *The John M'Intyre*, 9 P. D. 135, 139; approved by Lord Watson, *The Ceto*, 14 App. Cas. 670, 687.
(*q*) 14 App. Cas. 670, 695.
(*r*) 6 Asp. M. C. 310.

duty of a man who hears in a fog a whistle which he takes (at a guess) to be two or three points on his bow, is to reduce his speed until his engines are only just moving, or to stop them, and when he is beginning to lose steerage way, then, and only then, put them on again, but as slowly as it is possible to do so. Art. 18.

The Dordogne (*s*), in a fog so dense that vessels could not be seen by each other their own distance apart, in the ocean off Ushant, heard three times, at least, the whistle of another approaching. Within ten or fifteen minutes of the first whistle being heard, the ships were in collision. *The Dordogne* stopped and reversed her engines when the other ship came into view, and not before. It was held that she had broken Art. 18, and that she had also broken Art. 13. The duty of a steamship, under Articles 13 and 18, when in frequented waters, or in the vicinity of other ships, to proceed at her lowest possible speed, or, under the circumstances of the particular case, even to bring herself to a standstill, was strongly insisted upon. *The Dordogne.*

The Lebanon and *The Ceto* (*t*), steamships of 395 and 612 tons respectively, were approaching each other at night off the Yorkshire coast upon opposite (S. by E. ½ E. and N. by W.) courses in a fog so dense that neither could see the other more than a ship's length off. *The Lebanon's* whistle was heard from *The Ceto* less than a mile off, and four points on her port bow. *The Ceto's* helm was ported. *The Lebanon's* whistle was again heard nearer and on the same bearing. *The Ceto's* helm was again ported. *The Ceto* was going as slowly as she could go throughout. *The Lebanon's* whistle was again heard, and this time giving the starboard helm signal. Immediately afterwards she came into view a ship's length off *The Ceto* and a point on her port bow. *The Ceto*, on hearing the starboard helm signal, and in answer to a hail from *The Lebanon*, put *The Ceto.*

(*s*) 10 P. D. 6.

(*t*) *The Ceto*, 14 App. Cas. 670.

Art. 18. her helm hard a-port and set her engines full speed ahead. *The Lebanon* struck her on her port quarter thirty feet from the stern, and she sank. *The Lebanon* was found to be alone in fault in the Admiralty Division and Court of Appeal. The House of Lords (*u*) varied this decision by finding *The Ceto* also in fault, under Art. 18 (*x*), for not having stopped and reversed before *The Lebanon* came into view, and after she heard the second whistle and judged her to be approaching upon the same bearing.

The Ebor. *The Telesilla*, in a thick fog off Cromer, heard, nearly right ahead, the whistle of *The Ebor* about a mile off. She was held in fault, under Art. 13 and under Art. 18, for not stopping and reversing at once (*y*).

Result of the cases. The result of these cases may be thus summed up: *The Frankland* decides that a steamship in a fog, hearing the whistle of another steamship approaching, should bring herself to a standstill, at the latest when the ships are within hailing distance. *The Jesmond*, *The Love Bird*, *The Dordogne*, *The Kirby Hall*, and *The Ceto*, are to the like effect. But *The Jesmond* does not, nor does *The Kirby Hall*, decide that in a fog a steamship must stop and reverse her engines as soon as she hears the whistle of another. *The Jesmond* decides that where two steamships are approaching each other with risk of collision, and one of them, by altering her course, determines the risk, Art. 18 does not require her to stop or reverse; but if the risk is not in fact determined, although the course may have been altered, *The Ceto* decides that the engines must be stopped and reversed. *The Khedive* decides that if the omission to stop and reverse might by possibility have contributed to the collision, the ship will be held in fault, though those on board showed no want of ordinary skill, care, or nerve. It appears, on the other hand, from

(*u*) Lords Halsbury, Watson, Bramwell, Herschell, and Macnaghten; Lords Selborne and Fitzgerald dissenting.

(*x*) Lords Bramwell and Halsbury intimated that she was in fault apart from the Regulations.

(*y*) *The Ebor*, 11 P. D. 25.

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The Khedive (*z*), *The Emmy Haase*, *The Beryl*, *The Theodore H. Rand*, *The Ceto*, and *The Memnon*, that an omission to comply with the Regulation will not be deemed a fault unless the officer knows, or ought to have known, and, but for his negligence, would have known, that the Regulation in question was applicable. *The Benares* decides that where there is one chance, and one chance only, of escaping collision, and that is, not to stop and reverse, Art. 23 applies, and justifies a departure from Art. 18. *The Beryl* and *The Ceto* show that a vessel will be held in fault if, although she slackens her speed, or if, although going as slow as she can, she does not stop and reverse until the collision is inevitable, provided those on board had time and opportunity to stop and reverse, after slackening, and before the collision was inevitable.

Art. 18 is not infringed unless there is an opportunity of obeying it.

Art. 18 does not require a steamship to slacken and reverse at the very moment when danger arises. "A man must have time to consider whether he should reverse or not. The Court is not bound to hold that a man should exercise his judgment instantaneously. A short, but a very short time, must be allowed him for this purpose" (*a*). But it is, of course, not an excuse for non-compliance with Art. 18, that the time which elapsed between the risk of collision becoming apparent and the collision, was so short that the engines could not reasonably have been stopped and reversed, if the shortness of the time was due to want of a proper look-out. Thus, where it was proved that more than half-a-minute must have elapsed from the red light of an approaching steamship, A., coming into view on the starboard bow of the other, B., had a good look-out been kept on board B., B. was held in fault for not having reversed before the collision. If the red light had, in fact, been visible for

(*z*) 5 App. Cas. pp. 894, 902.

(*a*) *Per* Butt, J., *The Emmy Haase*, 9 P. D. 81; and see *per* Brett, M. R., *The Beryl*, 9 P. D. 137, 138, *supra*, p. 47; *The Hubbuck*, Ad. Div. 28th June, 1887.

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only half-a-minute before the collision, it seems that the vessel would not have been held in fault for not stopping and reversing in so short a time (*b*).

Object of Art. 18 is to minimize damage as well as to prevent collision.

From a Scotch case before the House of Lords, it appears that neglect to obey Art. 18 will cause a ship to be held in fault, if the omission, though it could not have contributed to the collision, might have caused or contributed to the damage (*c*). And in *The Voorwaarts* and *The Khedive*, Lord Watson said that the rule (Art. 16 of the Regulations of 1863) was enacted "with a view to obviate the risk *and minimize the results*" of a collision (*d*).

Art. 18 does not apply to steamship lying dead in the water.

Art. 18 has no application to a steamship lying dead in the water with her engines stopped. There is some difficulty in saying what, under the Regulations, is the duty of a vessel so situated in a fog, and hearing the whistle or horn of another vessel approaching her. Neither does Art. 18 forbid her to set her engines ahead or astern, so as to get some way on and be to some extent under command (*e*); nor, on the other hand, does Art. 13 require her to move.

A paddle-wheel steam trawler, going through the water (*f*) one or one-and-a-half knots with her trawl down, saw a sailing ship approaching her with both side lights open for ten or twelve minutes. She stopped without reversing her engines as soon as danger became imminent. It was assumed by Butt, J., that Art. 18 applied to her (*g*), and he held that she had complied with it.

Though Art. 18 does not apply to sailing ships, it has been said that a sailing ship in a fog, or under circum-

(*b*) *The Emmy Haase, supra.*

(*c*) *Maclaren* v. *Compagnie Française de Navigation à Vapeur, The Thames* and *The Lutetia*, 9 App. Cas. 640, 649, 652.

(*d*) 5 App. Cas. 903, 904.

(*e*) In *The Boskenna Bay* and *The Earl of Dumfries*, Ad. Ct. 14th Jan. 1885, this question was considered.

(*f*) *The Tweedsdale*, 14 P. D. 164. That she was going through the water is clear from the facts.

(*g*) At least as regards stopping. As to reversing, probably, she could not with safety, because of her trawl warp.

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stances similar to those in which Art. 18 applies, is under a corresponding obligation to shorten sail and reduce her speed as much as possible (*h*).

The burden is upon a vessel that does not obey Art. 18 to show why she did not do so.

Where a steamship has been in collision, and it is proved or admitted that she did not before the collision stop or reverse, it seems that the burden is on her to show why she did not comply with Art. 18. This burden she may discharge by showing that she was unable, or had not the opportunity, to stop and reverse (*i*), or that the omission to do so was the one only chance of escaping collision (*k*).

In America, it has been held by the Supreme Court that the rule requiring a steamship to slacken does not apply where, if both ships continue their courses, they will pass clear, although, if either deviates from her course, there will be risk of collision (*l*).

Overtaken steamship.

A steamship being overtaken by another vessel is not "approaching" the overtaking ship within the meaning of Art. 18. Her duty, therefore, is to keep her course under Art. 22, and not to slacken under Art. 18, for that Article does not apply to her (*m*).

Engines not to be set on ahead until risk is over.

To comply with Art. 18, a vessel must not only slacken or stop, but she must not set her engines ahead again until the risk of collision is past (*n*).

Duty to stop or ease the engines where the other ship's lights or course cannot be made out.

If a steamship sights another ship or her lights, and cannot clearly make out what course she is upon, it is her duty at once to slacken until she can ascertain what the stranger's course is, so that she may be able to take the measures required by the Regulations (*o*); and she must do so before altering her helm, or taking any decisive step;

(*h*) See *per* Brett, M. R., *The Dordogne*, 10 P. D. 6, 12, and see *supra*, p. 405.

(*i*) See *The Khedive*, 5 App. Cas. 876, 902.

(*k*) *The Benares*, 9 P. D. 16.

(*l*) *The Free State*, 1 Otto, 200; Brown, Adm. 251. See, however, *The Manitoba*, *supra*, p. 444, 15 Davis, U. S. 97.

(*m*) *The Franconia*, 2 P. D. 8.

(*n*) In *Dowell* v. *General Steam Navigation Co.*, 5 Ell. & B. 195, under the old law, it was held that a ship was in fault if she did not continue to exhibit a light so long as danger of collision existed.

(*o*) *The Rona* and *The Ava*, 2 Asp. Mar. Law Cas. 182; *The General Lee*, 3 Mar. Law Cas. O. S. 204.

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for if she does not, and by altering her helm without knowing the other ship's position and course, causes a collision, she will be held to be in fault (*p*).

Speed of a steamship approaching other craft.

Steamers navigating at a high rate of speed are required to slacken their speed when approaching other ships, when there is difficulty or danger in passing them. In America, it has been held by the Supreme Court that a large steamer approaching a tug with a number of barges in tow, and surrounded by other vessels, was bound to slacken, and not "hurl herself like a projectile in the midst of them" at the rate of seventeen miles an hour, taking the chance of clearing them (*q*). And in another case, it was held by the same Court that a large steamer entering a harbour or narrow channel was bound to go at such speed as is consistent with the safety of other vessels (*r*).

A steamship in the North Sea on a clear night, going eight or nine knots over trawling ground, and running into a smack which showed no light astern, was held not to be in fault for going too fast (*s*). In an early case (*t*), it was held that, on a dark night in the Bristol Channel, ten knots was an improper speed for a steamship.

Stopping and reversing not always a prudent measure.

In applying Art. 18, it must be borne in mind that reversing the screw, whilst the ship has headway through the water, always diminishes the turning power of the helm. In the case, therefore, of a screw steamship, stopping and reversing her engines is not always a necessary, or even a prudent, step for her to take when at close quarters with another ship. On the other hand, the common excuse that the engines were not stopped and reversed because of the deadening effect of the reversed propeller upon the port helm is viewed by the Courts with suspicion (*u*).

(*p*) *The Bougainville* and *The Jas. C. Stevenson*, L. R. 5 P. C. 316. As to ships in a fog, see *The Frankland*, L. R. 4 P. C. 529; *The Kirby Hall*, 8 P. D. 71; and *supra*. pp. 399, 403, 445.

(*q*) *The Syracuse*, 9 Wall. 672.

(*r*) *The City of Paris*, 9 Wall. 634; and see *The Corsica*, 9 Wall. 630.

(*s*) *The Pacific*, 9 P. D. 124.

(*t*) *The Rose*, 2 W. Rob. 1.

(*u*) As in *The Arratoon Apcar*, 15 App. Cas. 37.

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Effect of reversed screw whilst the ship has headway.

It may be convenient here to state shortly the effect, under ordinary circumstances, of reversing the propeller whilst the ship has headway through the water, an effect which must always be taken into consideration in determining the application of Art. 18. The behaviour of a steamship under these circumstances was not so generally known in the year 1862, when the stopping and reversing rule was framed, as it is at the present day. The propeller exerts considerable turning power on the ship, whether going ahead or astern, but more particularly when going astern (*x*). The effect is most strongly marked when the propeller is going astern and the ship has headway through the water, the circumstances under which Art. 18 is usually applicable. The turning effect is in the one direction or the other, according as the screw is right or left-handed. A right-handed screw revolves, when the engines are going ahead, viewed from astern, from left to right; a left-handed screw from right to left. When the screw is not deeply immersed, and froths air into water, it exerts, when reversed, considerable power to turn the ship's head, independently of the rudder, the ship turning to starboard or port, almost irrespective of the helm (*y*), according as the screw is right or left-handed. This effect is produced even whilst the ship has headway through the water; it increases as the ship's way is stopped. It nearly disappears when the screw is so deeply immersed that it does not churn air into water. Under the same circumstances —that is to say, whilst the ship has headway through the water, and the engines and screw are working astern—the action of the rudder is the reverse of that which it has whilst the engines and screw are going ahead. This reverse action of the rudder is always feeble, and is different for different ships, and even for the same ship under differ-

(*x*) This seems to depend upon the fact that the lower blades of the propeller being more immersed have a greater turning power than the upper.

(*y*) See an account of experiments with *The Tabor*, Nautical Mag. 1880, p. 323.

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ent conditions of loading. When there is wind sufficient to heel the ship, the advancing end of the ship, whether head or stern, will always seek, or fly up into, the wind.

The combined influences of (1) the reversed screw, (2) the wind, and (3) the rudder, severally acting in the manner above described, determine the course of the ship until her way is stopped. Their utmost effect, when all acting in the same direction (*e. g.*, screw, right-handed; helm, starboard; wind, on the starboard side), is small compared with the influence which the rudder exerts when the ship and engines are going full speed ahead. A circle of at least double the radius of that in which the ship will turn, when going ahead, is required for her to turn in when the engines are going astern under the circumstances above described. So marked is this diminution in the turning capability of a ship with her screw suddenly reversed from full speed ahead, that, under some circumstances, a vessel running at right angles upon a straight coast at full speed might avoid going ashore, by keeping on full speed ahead with her helm hard over, when she could not keep off the shore by stopping and reversing her engines.

It follows from the general rules above stated, that, with engines going astern whilst the ship has headway through the water, the position and direction of the rudder with reference to the ship's keel is of paramount importance. Under such circumstances, a vessel with a right-handed screw will turn her head much quicker to starboard (her helm being to port, and her engines reversed) than it is possible for her to turn her head to port; and *vice versâ* with a left-handed screw (*z*).

(*z*) The authority for most of the statements in the text is the Report, published in 1875, of a Committee (J. R. Napier, Esq., Sir W. Thompson, W. Froude, Esq., J. T. Bottomly, Esq., and Professor Osborne Reynolds) appointed by the British Association to investigate the effect of propellers upon the steering of vessels. Further information upon the subject will be found in Naval Science, 1873, p. 89; Nautical Magazine, 1879, pp. 529, 608; *ibid.* 1880, p. 323; Transactions of the Institute of Naval Architects, 1879, a paper by A. J.

Article 19 (*a*).

Art. 19.

Optional sound signals to indicate the course of ships under steam.

In taking any course authorized or required by these Regulations, a steam-ship under way may indicate that course to any other ship which she has in sight by the following signals on her steam whistle, viz.:—

One short blast (*b*) *to mean "I am directing my course to starboard."*

Two short blasts to mean "I am directing my course to port."

Three short blasts to mean "I am going full speed astern."

The use of these signals is optional (*c*); *but if they are used, the course of the ship must be in accordance with the signal made.*

This Article was not contained in the Regulations of 1863. It is in the same terms as Art. 19 of the Regulations of 1880. It applies only where a ship intends to comply with the Regulations, and is desirous to call the attention of the other ship to her intended course. Such signals have been in use in America for many years. It has been there held that a vessel cannot, by means of these signals, dictate to the other ship a departure from the Regulations (*d*). Care must be taken that the "short" blasts of Art. 19 are not confounded with the "prolonged" fog-signal blasts of Art. 12.

It will be observed that Art. 19 applies only where the

Maginnis, Esq. In connection with this subject, the following facts, collected from the above sources, may be not without interest:—A screw steamship usually answers one helm quicker than the other, whether going ahead or astern; but different ships behave differently in this respect. When just starting a steamship will answer her starboard helm quickest if her screw is right-handed, and her port helm if her screw is left-handed. When going ahead at a moderate or full speed she answers her port helm quickest with a right-handed, and her starboard helm with a left-handed screw.

(*a*) Corresponding to Art. 28 of the Washington Regulations.

(*b*) Of about one second's duration: Washington Regulations.

(*c*) By the Washington Regulations they are compulsory.

(*d*) *The Milwaukee*, Brown Ad. 313.

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other vessel is in sight. In a fog so dense that the other vessel cannot be seen, it seems that it has no application,

Meaning of the words "I am directing my course to starboard" (or port).

Doubts have been raised as to the meaning of the words "I am directing my course to port" (or starboard). It is submitted that these words mean "I am putting my helm to starboard" (or port, as the case may be). The reason why these latter words are not used is indicated in a former page, where it is pointed out that in Art. 15 similar words, "alter her course to starboard," are substituted for "the helms of both shall be put to port," the words in the Regulations of 1863. It has been suggested that "I am directing my course to starboard" is ambiguous, and may mean "my present course will take me on *your* starboard side." It is submitted that this is not the intention or meaning of the Article. The object clearly is to apprise the other ship of an alteration of the helm at the earliest possible moment. It is of the greatest importance, when ships are at close quarters, that each should know of any alteration of the helm of the other at the moment it is made, so that she may act accordingly. In the absence of some such indication as is provided by Art. 19, the ships may be approaching each other dangerously close, whilst they are endeavouring to ascertain how each others' helms are acting. The size and length of modern steamships, and their consequent slowness in answering their helms, makes this a matter of increasing difficulty.

Article 20 (*e*).

Art. 20.

Ship overtaking another ship.

Notwithstanding anything contained in any preceding Article, every ship, whether a sailing-ship or a steam-ship, overtaking any other, shall keep out of the way of the overtaken ship.

This Article is identical with Art. 20 of the Regulations of 1880. It corresponds with Art. 17 of the Regulations

(*e*) Corresponding to Art 24 of the Washington Regulations.

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of 1863, but its operation is larger. The opening words, "Notwithstanding, &c.," are intended to meet a difficulty, which existed under the Regulations of 1863, as to the duty of a sailing ship overtaking a steamship, and as to the duty of a sailing ship or a steamship overtaking another sailing or steamship from abaft the beam of the latter, and crossing her course. In these cases there was an apparent conflict between Art. 15 and Art. 17 (*f*), and between Art. 12 and Art. 17 (*g*), of the Regulations of 1863.

Art. 20 is express as to the duty of a sailing ship overtaking any other ship to keep out of the way. It is therefore the duty of a sailing ship overtaking a steamship to keep out of the way of the steamship.

The Regulations do not prescribe any particular course for the ship to take whose duty it is to keep out of the way. She may go ahead or astern of the other, or on either side of her, as she thinks best (*h*). The duty of the overtaken ship is considered below (*i*).

Art. 20 overrides Art. 14 and Art. 16.

Under the Regulations of 1880 a ship may be an "overtaking" ship within Art. 20, when, if her speed were not greater than that of the other vessel, she would be a "crossing" ship within the meaning of Art. 16, or approaching the other so as to involve risk of collision within the meaning of Art. 14. The "overtaking" rule (Art. 17) of the Regulations of 1863 seems to have left a doubt in some cases as to the relative duties of two ships, one of which was at once crossing and overtaking the other; and the existing Art. 20 was framed in its present terms in order to remove such doubt. Therefore the overtaking, and not the crossing, rule is to prevail when there is any doubt (*k*).

(*f*) See *The Philotaxe*, 3 Asp. Mar. Law Cas. 512; *The Wheatsheaf* and *The Intrepide*, 2 Mar. Law Cas. O. S. 292.

(*g*) See *The Peckforton Castle*, 2 P. D. 222; 3 P. D. 11; *The Franconia*, 2 P. D. 8.

(*h*) See Art. 14, p. 409, above.

(*i*) Art. 22, p. 471, below.

(*k*) See *per* Butt, J., in *The Seaton*, 9 P. D. 1; *supra*, p. 426.

Art. 20.

The observations of Sir R. Phillimore in *The Breadalbane* (*l*), to the effect that where the ships are crossing Art. 14 is to prevail, appear not to be well-founded.

What is an "overtaking" ship?

There is nothing in the Regulations to indicate how one ship must bear from another in order to be an "overtaking" ship. A ship dead astern of another, or on her quarter, is no doubt an "overtaking" ship, if coming up with the other ahead. Whether a ship a point or two on the beam of another is "overtaking" the latter, if going at a greater speed, is not clear. Under the Regulations of 1863, a rule was suggested by Brett, L.J., in *The Franconia* (*m*), to the effect that a vessel approaching another from a direction in which, if it were night, the side lights of the ship ahead would not be visible to her, should be considered as an "overtaking" ship; and that a vessel approaching another from any other direction except directly ahead should be "crossing." This, though perhaps not exhaustive, is a sound working rule (*n*), and has been approved in the House of Lords (*o*). Fry, L.J., has defined an overtaking ship in wider terms: "A ship .... is being overtaken when she is a ship towards which there is another ship going at a greater speed than the first, in such a direction as to approach the first ship" (*p*). These definitions were arrived at in a case under Art. 11 (the stern light rule) with reference to a ship which is "being overtaken" within the meaning of that Article. It is submitted that "being overtaken" in Art. 11, and "overtaking" in Art. 20, are correlative terms, and that the conditions under which the two Articles are applicable are the same (*p*).

(*l*) 7 P. D. 186.

(*m*) *The Franconia*, 2 P. D. 8, 12.

(*n*) See *per* Lord Herschell in *The Main*, 11 P. D. 132, 139. In the Washington Regulations this definition is adopted in terms.

(*o*) The doubts expressed in the Court of Appeal (see *The Peckforton Castle*, 3 P. D. 11) as to the correctness of this definition were considered by Lords Esher and Herschell in *The Main* (*supra*) to be unfounded.

(*p*) See further upon this point Art. 11, *supra*, where *The Main* is stated at length.

Art. 20.

A ship coming up with another on a course differing from that of the latter by half a point, was held to be "overtaking" her (*q*); and in *The Breadalbane* (*r*), Sir R. Phillimore applied the overtaking rule (Art. 20) to a ship on a course differing from that of the other by one and a half points (E. by N., and N.E. by E. ½ E.).

The Seaton and *The Polcevera* were on parallel (S.W. by S. W.) courses, *The Polcevera* being abaft the starboard beam of *The Seaton*, and overtaking her. When the ships were about three or four miles apart, *The Polcevera* altered her course to S. ½ W., thereby causing risk of collision. It was held that *The Polcevera*, the overtaking vessel, was required by Art. 20 to keep out of the way, and that she was in fault for the collision which followed, because by starboarding, she threw herself across the course of *The Seaton* (*s*), and brought about a position of danger.

Under a provision of the Tyne bye-laws, that "when steam vessels are proceeding in the same direction, but with unequal speed, the vessel which steams slowest shall, when overtaken," take certain steps to enable the other to pass, it was held by the Privy Council that this rule applied only to a vessel overtaking and passing another actually on the same course as herself (*t*).

In *The Cayuga* (*u*), the Supreme Court of the United States expressed an opinion that a vessel was "overtaking" another within the meaning of Art. 17 of the Regulations of 1863 only when astern of the other and pursuing the same general direction. In that case it was held that two steamships on intersecting courses (S. by E. and S.S.W.) were crossing ships, although one was abaft the beam of, and going faster than, the other. As stated above (p. 429),

(*q*) *The Chanonry*, 1 Asp. Mar. Law Cas. 569.
(*r*) 7 P. D. 186.
(*s*) *The Seaton*, 9 P. D. 1.
(*t*) *The Henry Morton*, 2 Asp. Mar. Law Cas. 466.
(*u*) 14 Wall. 270, 277.

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this case would not be followed in this country, and is inconsistent with other American decisions (*x*).

The rule, that an overtaking ship must keep out of the way of a ship ahead, was a rule of the maritime law, and was merely formulated by the Regulations of 1863 (*y*). It clashed, however, with the other equally well-established rule, that a ship with the wind free must keep out of the way of another close-hauled. In an American case, where a brig and a schooner were upon converging courses, the schooner overtaking the brig, it was held that the brig was in fault for not keeping out of the way, she having the wind free. It was said that, if she had been close-hauled, it would not have been her duty to keep out of the way (*z*). Under the existing law, a sailing ship overtaking another must keep out of the way, though she is close-hauled, and the other is free.

The rule, that an overtaking ship must keep out of the way of a ship ahead, is a rule of the maritime law.

A ship cannot, it seems, be an "overtaking" ship within the meaning of Art. 20, unless she is going faster than the ship ahead (*a*).

The duty of the ship ahead, under ordinary circumstances, is to keep her course under Art. 22, and in the case of a steamship, not, it seems, to slacken or stop. Art. 18 does not apply to her, as she cannot be said to be approaching the overtaking ship within the meaning of that Article (*b*). Where the overtaking ship was on the quarter of the ship ahead, and the latter altered her course so as to give the other ship more room, it was held that she did not thereby depart from the Regulations, so as to be held in fault for a collision which followed (*c*). But an alteration of the helm after Art. 22 applies is a dangerous

Duty of overtaken ship.

(*x*) *The Oceanus*, 5 Bened. 545; see also *The Governor*, Abbot, Ad. 108; *The Rhode Island*, Olcott, 505; 1 Blatchf. 363.

(*y*) *Whitridge* v. *Dill*, 23 How. 448.

(*z*) *The Clement*, 1 Sprague, 257; 2 Curtis, 363. The Supreme Court was equally divided.

(*a*) *The Franconia*, 2 P. D. 8.

(*b*) *The Franconia*, *ubi supra*.

(*c*) *The Franconia*, 2 P. D. 11.

manœuvre, for it would, in most cases, bring the ship within the penalty of 36 & 37 Vict. c. 85, s. 17. Art. 20.

The duty of the ship which is being overtaken to show a light astern is considered in a previous Article (*d*).

It is the duty of a steamship overtaking a sailing ship to keep out of the way of the latter, both by virtue of Art. 17 and Art. 20.

The following cases illustrate the application of Art. 20:—

Cases illustrating the application of Art. 20.

A steamship attempted to pass a sailing ship turning up the Thames against a head wind. Owing to the latter going about when she got to the edge of the tide, the steamer ran into her. It was held that the sailing ship was under no obligation to give notice that she was going about, and that the steamer in attempting to pass did so at her own risk (*e*).

Where a sailing ship, A., with the wind free, was approaching another, B., hove-to, and driving to leeward in such a direction that her side lights were not for some time visible to A., it was held that it was the duty of A. to keep out of the way (*f*). It does not appear whether the decision was on the ground that A. was "overtaking" B., or that A. was "crossing" B. and to windward of her, with the wind on the same side, or whether it was A.'s duty to keep out of the way because she was going free and the other ship hove-to.

When two ships turning to windward in narrow waters are close-hauled on the same tack, one following in the wake of the other, if the leading ship goes about, and the following ship cannot stand on without risk of collision, it is the duty of the latter to keep out of the way of the ship ahead by going about (*g*).

(*d*) Art. 11, *supra*.

(*e*) *The Palatine*, 1 Asp. Mar. Law Cas. 468.

(*f*) *The Eleanor* v. *The Alma*, 2 Mar. Law Cas. O. S. 240.

(*g*) *The Priscilla*, L. R. 3 A. & E. 125; *The Eclipse* v. *The Royal Consort*, Holt, 220.

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If two ships are turning to windward, and the one ahead, instead of going about, wears, it seems that, while she is in the act of wearing and approaching the ship astern, the latter is not an "overtaking" ship, and that she is not required to keep out of the way (*h*).

Two steamships in the open sea were proceeding on parallel courses, one on the quarter of the other and overtaking her. The overtaking ship, when three miles off the other, altered her course towards the other ship, and subsequently came into collision with her. The other ship did nothing. The overtaking ship was held solely in fault for the collision (*i*).

It has been held in America that a vessel was in fault for attempting to pass another ahead in a channel so narrow that there was risk in making the attempt (*k*), and that the rule requiring the overtaking ship to keep out of the way does not cease to operate the moment the overtaking ship gets her nose in front of the other (*l*).

Article 21 (*m*).

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Steamships in narrow channels.

In narrow channels every steam-ship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship.

History of the "starboard side" rule.

This Article is identical with Art. 21 of the Regulations of 1880. Those of 1863 contained no corresponding rule. The Article is substantially the re-enactment of a rule which existed from 1840 to 1862. During those years there were in force various Acts requiring ships to navigate on the starboard side of rivers and narrow channels. By

(*h*) *The Falkland* and *The Navigator*, Br. & Lush. 204.

(*i*) *The Seaton*, 9 P. D. 1.

(*k*) *The City of Paris*, 1 Benedict. 174; 9 Wall. 634; *The Narragansett*, *infra*; *The Nova Scotia* and *The Quebec*, 1 Quebec L. R. 1; *The Farewell*, 8 Quebec L. R. 87.

(*l*) *The Narragansett*, 10 Blatchf. 475.

(*m*) Corresponding to Art. 21 of the Washington Regulations.

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9 & 10 Vict. c. 100, s. 9, steamships were required to keep on the starboard side of mid-channel, "due regard being had to the tide and the position of each vessel in such tide." In *The Leith* (*n*), this was interpreted to mean that a ship was to keep on the starboard side, "provided it may be done with convenience and safety" to the other vessel. By subsequent Acts (14 & 15 Vict. c. 79, s. 27, and 17 & 18 Vict. c. 104, s. 297) the rule was re-enacted with the omission of the words as to having regard to the tide. In several cases (*o*) decided under these Acts, it was held that no practice of the river as to ships keeping in or out of the strength of the tide, and no considerations of convenience, would justify a deviation from the express enactment as to keeping on the starboard side. By 25 & 26 Vict. c. 63, the starboard side rule was repealed, and from 1862 to the 1st of September, 1880, vessels were free to navigate on either side of rivers, except in certain waters where a special rule was in force under local Acts. Such special rules are now in force in the Mersey, the Clyde, the Tyne, the Tees, and in Cork or Queenstown harbour (*p*); also in the Danube (*q*). Vessels entering Sorel harbour are required to keep on the port side (*r*).

Consequence of navigating on the wrong side of a narrow channel.

The re-enactment of the starboard side rule and its insertion in the Regulations are of the utmost consequence to seamen. Any person in charge of a ship who navigates her on the wrong side of a narrow channel, besides being guilty of a misdemeanor, will almost inevitably subject himself and his owners to liability for any collision occur-

(*n*) 7 Not. of Cas. 137.

(*o*) *The Duke of Sussex*, 1 W. Rob. 274; *The Sylph*, 2 Sp. E. & A. 75; *The Panther*, 1 Sp. E. & A. 31; *The Malvina*, 1 Moo. P. C. C. N. S. 357; *The Mœander* and *The Florence Nightingale*, *ibid.* 63; *The Seine*, Swab. Ad. 411; *The Hand of Providence*, *ibid.* 107; *The Unity*, *ibid.* 101; *The Nimrod*, 15 Jur. 1201, are decisions under the starboard side rule of former Acts.

(*p*) See Appendix for these rules; for an application of the Tees rule, see *The Mary Lohden*, 6 Asp. M. C. 262.

(*q*) See *The Yourri* and *The Spearman*, 10 App. Cas. 276; Danube Rules, r. 32.

(*r*) 43 Vict. c. 29 (Canada), Art. 28.

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ring when he is on his wrong side, unless it is proved that his being on the wrong side was unavoidable (*s*).

What is a "narrow channel"?

There is considerable difficulty in defining a "narrow channel" within the meaning of Art. 21. The entrance to the Straits of Messina was held by the Privy Council to be a narrow channel within Art. 21 (*t*); and the rule has also been applied to the entrance of Falmouth harbour (*u*), and to the Cardiff drain at its junction with the entrance channel to the Roath basin (*x*). On the other hand, an outward part of the sea channels at the entrance of the Mersey was, under a former Act, held not to be a narrow channel (*y*). Under the earlier Act there was considerable discussion as to the meaning of "mid-channel" (*z*). In the present Article "fairway or mid-channel" would probably be held to mean the deep water channel navigable for heavy ships. The words "when it is safe and practicable" appear to qualify the general operation of the rule; but it is doubtful whether they have any further effect than the general saving clause of Art. 23 (*a*). They probably would be held to apply to the case of a steamship on her right side of the channel falling in with a sailing ship on her wrong side, so as to require the steamship to keep out of the way of the sailing ship in compliance with Art. 17, notwithstanding the fault of the latter in being on her wrong side (*b*). The same observation applies in the case of any overtaking ship or any other ship whose duty it is under the Regulations to keep out of the way.

The application of Art. 21 does not, it seems, prevent

(*s*) 36 & 37 Vict. c. 85, s. 17.
(*t*) *The Rhondda*, 8 App. Cas. 549.
(*u*) *The Clydach*, 5 Asp. M. C. 336.
(*x*) *The Leverington*, 11 P. D. 117.
(*y*) *The Mæander*, 1 Moo. P. C. C. N. S. 63.
(*z*) *Smith* v. *Voss*, 2 H. & N. 97.
(*a*) As to the meaning of these words in former Acts, see *The Unity*, Swab. Ad. 101; *The Hand of Providence*, *ibid.* 107; *The Nimrod*, 15 Jur. 1201; *The Panther*, 1 Sp. E. & A. 31.
(*b*) See *The Electric* and *The Ella Mary*, Board of Trade Enquiry, Mitch. Mar. Reg. 1879, p. 1436.

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the application at the same time of the other steering and sailing rules. Thus, where a ship, A., being in Cardiff drain, was required by Art. 21 to keep on the starboard side, and the other ship, B., was in the entrance channel to the Roath basin, it was held that they were crossing ships, and that A., having B. on her starboard hand, was required by Art. 16 to keep out of the way (*c*).

The Perim, in a narrow channel (near Cronstadt), was held not to be bound by Art. 21 because at the time of the collision she was making for a pilot station on the port side of the channel to discharge her pilot (*d*).

Does Art. 21 apply where local rules are in force?

Questions may arise as to the application of the starboard side rule of Art. 21 in waters where (as, for example, the river Thames) local rules of navigation are in force, but where there is no rule as to the side of the channel upon which ships are to navigate. It is submitted that in such cases Art. 21 has no application, and that absence in the local rules of a rule requiring vessels to navigate on one side of the channel or the other leads to the inference that vessels are free to navigate in any part of the channel. It was recently so held with reference to the navigation of the Thames at Milwall (*e*). The question, however, is not free from doubt; it may be contended that the local rules are supplementary to the general Regulations (*f*). The Regulations, though headed as "Regulations for Preventing Collisions at Sea," would probably be held, at least as regards Art. 21, to apply in rivers and British waters where no local rules are in force. Even in foreign waters there is reason to think that the starboard side rule might be applied upon the principle enunciated in *The Fyenoord* (*g*).

The application of Art. 21 is in some measure illustrated

(*c*) *The Leverington*, 11 P. D. 117.
(*d*) *The Perim*, Ad. Div. 10th Nov. 1886.
(*e*) *The Écossaise*, Ad. Div. Dec. 1885.
(*f*) See *infra*, Art. 24.
(*g*) Swab. 374.

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by the cases relating to the analogous rule applicable to vehicles on a highway on land. In these cases it has been held that, whilst a driver on his wrong side is required to exercise more than ordinary care to avoid other vehicles (*g*), the rule of the road is not to be treated as the sole criterion of negligence (*h*). But the important distinction created by 36 & 37 Vict. c. 85, s. 17, in case of collision between ships, must not be overlooked in considering the application of the cases relating to collisions on land.

At the trial of a collision case before a jury the question has arisen whether it is for the judge or for the jury to decide what is a narrow channel. The point was not decided (*i*).

Rules in American rivers.

In America some of the States have passed laws as to the side on which vessels are to navigate; and in some rivers there is a customary track. Sometimes an ascending ship must keep on one side or the other of mid-channel, leaving the middle of the river to descending ships. In the East River, at New York, it is the law that vessels going up or down shall keep in mid-channel. Where a ship is required by law or usage to keep on one side or the other, if she is on her wrong side she is held to be in fault for a collision with another ship that is on her right side and has done all that the law requires to keep clear (*j*).

Difficulty of applying the "crossing" and "meeting" rules in a winding river.

There is great difficulty in determining the application of some of the articles of the general Regulations to ships navigating a narrow and tortuous river. It appears to have been held by the Privy Council (*k*), in the case of two ships bound up and down a river, and first sighting

(*g*) *Pluckwell* v. *Wilson*, 5 Car. & P. 375.

(*h*) *Wayde* v. *Lady Carr*, 2 Dow. & Ry. 255; *Wordsworth* v. *Willan*, 4 Esp. 273.

(*i*) *Australian Steam Navigation Co.* v. *Smith*, *The Birksgate*, and *The Barrabool*, 14 App. Cas. 318.

(*j*) 1 Parsons on Shipping (ed. 1869) 582; *The Ivanhoe* and *The Martha M. Heath*, 7 Benedict. 213; *The Vanderbilt*, 6 Wall. 225; *The Bay State*, 3 Blatchf. 48.

(*k*) See *The Velocity*, and cases cited below.

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each other on opposite sides of a point of land round which the river winds, that the ships are not "crossing" ships within the meaning of the Regulations; and that, if they are then on different sides of the river, the duty of each is to pursue her course as if the other were not in sight. If, when they first sight each other on opposite sides of a point of land, they are both in mid-channel, or equidistant from the same shore, it is not clear how, and on which side, the law requires them to pass each other (*l*). It may happen, in such a case, that owing to the way of the ships through the water and the set of the tide it is possible for them to clear each other with certainty in one way, and in one way only.

Customary course in rivers.

In most tidal rivers there is a customary track for vessels going with the tide, and another for those going against it (*m*). Its course depends mainly on the practice for ships with a fair tide to keep in its strength, and for those with a foul tide to "cheat" it, or keep out of its strength. In a winding river, where there is an off-set of the tide from the points into the opposite bights, ships usually cross from one side of the river to the other at or about particular places in the different reaches. It has been held that such a practice, although not strictly a custom binding upon all ships, is one which a ship is justified in following and in assuming that other ships will follow (*n*). And it appears that this is so although her position with regard to another vessel is such that if she were in the open sea the Regulations would apply and require her to act differently. In determining, therefore, what are the proper steps for a ship to take in order to avoid another approaching her in a

(*l*) As to the duty of two ships rounding a bend in a river in opposite directions, one outside the other, see *The Bytcell Castle*, 4 P. D. 219, *per* Brett, L. J.

(*m*) In *The Cambria*, Ad. Div. May, 1887, Hannen, P., was advised by his assessors that there is no usage for ships bound down the river to keep either to the north or to the south side of the river from Milwall Pier round the Isle of Dogs.

(*n*) *The Esk* and *The Niord*, L. R. 3 P. C. 436, 442.

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winding river, the sinuosities of the river, and also the usual course of vessels in the river, must be taken into consideration. In cases where, if each ship continues her course in the usual track, they will pass clear, although if either deviates from it there would be risk of collision, it appears that the Regulations do not apply, and that it is the duty of each vessel to continue her course in the usual track and as if the other were not in sight (*o*).

It has recently been held in the Admiralty Division that it is a prudent rule in a winding tidal river, in the absence of special regulations, for a steamship about to

(*o*) *The Velocity*, L. R. 3 P. C. 44; *The Cologne* and *The Ranger*, L. R. 4 P. C. 519; *The Esk* and *The Nord*, L. R. 3 P. C. 436; *The Kjoberhavn*, 2 Asp. Mar. Law Cas. 213, 217; *The Golden Pledge*, Holt, 133; but see the observations of James, L. J., on these cases in *The Oceano*, 3 P. D. 60; see also *The Milwaukee*, Brown, Ad. 313. The principle adopted in the above cases by the Privy Council, that in determining the application of the Regulations in a winding river the customary track of ships is to be considered, does not appear to have been followed by Dr. Lushington under former Acts and Rules. In *The Friends*, 1 W. Rob. 478, and *The Gazelle*, *ibid.* 471, he expressed a strong opinion that where, except for the practice of the river as to keeping in or out of the strength of the tide, the Rule of the Road (the Trinity Rule of 1840) would apply, the case was not taken out of the rule by the practice. In *The Friends*, a steamship, going up the Thames against the ebb, sought to justify her not porting in compliance with the Trinity Rule upon the ground that the practice of the river required the other ship, which was going down with the ebb, to keep in the strength of the tide, and herself (*The Friends*) to keep out of it. Dr. Lushington refused to recognize the practice of the river in such a case. In addressing the Trinity Masters, he said:—"All I can say is this, if you are about to make an exception from your own rules—an exception not to be extracted from anything to be found in the Rules themselves, but to be founded upon reasons which have been alleged for the sake of safe navigation of the river Thames, and the great interests which are daily and hourly there at stake—let your exception be clear and intelligible, in order that it may at the first glance be known to the mercantile and maritime world. If, instead of a clear and direct rule, there is to be any exception, let it be as distinct and definite as the rule itself. Unless it be so it is obvious that persons in all cases will endeavour to form exceptions for themselves, and instead of security we shall have danger." And in *The Duke of Sussex*, 1 W. Rob. 274, it was held that the custom of the river as to vessels availing themselves of the strength of the tide was superseded by the Trinity Rule. The observations of Dr. Lushington as to the necessity of holding Regulations for preventing collisions to be almost of universal application, have lost none of their force, but there is some difficulty in reconciling them with the recent decisions of the Privy Council in the cases stated in the text.

round a point against the tide to wait until a vessel coming in the opposite direction has passed clear, and a steamship was held in fault for disregarding this precaution in the Scheldt (*p*). Art. 21.

It appears, however, from a decision of the Court of Appeal, that the cases above cited as to the application of the general Regulations in a winding river do not necessarily apply in a river where there are in force special rules made under a local Act for the express purpose of regulating its navigation. Although the Thames Rules (of 1872) were identical, as regards crossing ships, with the general Regulations, it seems to have been doubted whether the decision of the Privy Council in *The Velocity*, and other cases following it, that two ships rounding a point are not within the "crossing" rule, would be followed in a similar case arising under the Thames Rules (*q*). The particular point decided in *The Velocity* does not arise upon the existing Thames Rules (of 1880), which contain no rule corresponding to the "crossing" rule there discussed. But the principle involved in that and the other decisions above referred to is of wide application, and has an important bearing upon the existing Thames Rules, as well as other rules for the navigation of winding rivers. That principle is, that the questions, Whether there is risk of collision? and, What rule is applicable where there is such risk? depend rather upon the relative positions of the two ships in the river as regards mid-channel, and upon the customary track of ships in the river, than upon the heading of the two ships at a particular moment.

American cases as to the application of the Regulations in a winding river.

The following cases illustrate the view taken by the Supreme Court of the United States as to the application of the Regulations of 1863 in a winding river.

A sailing ship descending a river on a southerly course sighted a steamship ascending it. In accordance with the

(*p*) *The Talabot*, 89 L. T. 239. (*q*) *The Occano*, 3 P. D. 60.

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practice of the river, the sailing ship was on the west, and the steamship on the east, side of the channel. At a point between the two vessels the river took a bend in a south-easterly direction. On reaching this point the sailing ship's helm was put to starboard in order to round the bend. Instead of porting, so as to resume her course in the usual track along the west bank at a point where the channel turned again to the west and ran in its original southerly direction, the sailing ship continued the course she was on after her helm had been put to starboard. Crossing the channel to the east shore she ran into the steamship, which had continued her original course along that shore. It was held that the sailing ship was in fault for deviating from the customary track along the west shore; that her duty under the rule (identical with Art. 18 of the Regulations of 1863) requiring her to keep her course, was to keep her course along the west shore, deviating from a straight course only so far as the winding of the river required (*r*). The judgment of the Supreme Court in this case is to the effect that when a point of land or other obstruction in the navigation interferes with the literal application of the Regulations, they are, nevertheless, to be complied with so far as possible; that a vessel required by the law to keep her course, if she is compelled by an obstruction or bend in the river to deviate from it, must resume her original course as soon as possible. And the Court expressly held, that where two vessels will pass clear if each adheres to the customary track, the Regulations have no application; and that a vessel deviating from the customary track in supposed obedience to the Regulations is in fault.

In *The Free State* (*s*), a sailing ship was crossing a river diagonally, for a temporary purpose, when she sighted a steamship approaching with risk of collision; the Supreme

(*r*) *The John L. Hasbronck*, 3 Otto, 405. (*s*) 1 Otto, 200.

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Court held that the duty of the sailing ship was to keep on her course across the river. The sailing ship ascending a river on a northerly course and being overtaken by a steamship, starboarded until her head was N.W. by N., in order to give the steamship more room to pass on her starboard hand. While crossing the river on the N.W. by N. course she sighted another steamship descending the river and preparing to pass the ascending steamship port side to port side. After being passed by the ascending steamship the sailing vessel ported and attempted to follow in her wake, so as to pass the descending steamship port side to port side. In doing so she came into collision with the latter, and it was held by the Supreme Court that she was in fault for not keeping her N.W. by N. course.

When two steamships proceeding in the same direction were rounding a point or bend in a river nearly abreast, it was held that it was the duty of each to keep in her own water, and not attempt to cross the course of the other. The outside boat was held in fault for a collision that occurred while attempting to get in to the shore across the bows of the other (*t*).

In *The Milwaukee* (*u*), it was held that the question whether two ships were meeting "end on" in a river is to be determined by their general course in the river, and not by their compass course at a particular moment while they are pursuing the windings of the channel.

Article 22 (*x*).

Art. 22.

Ship not required to keep out of the way must keep her course.

Where by the above rules one of two ships is to keep out of the way, the other shall keep her course.

This Article is identical with Art. 22 of the Regulations of 1880. It answers to Art. 18 of the Regulations of 1863. It supplements, and must be read with, Arts. 14, 16, 17,

(*t*) *The Oceanus*, 12 Blatchf. 430.
(*u*) Brown, Adm. 313.
(*x*) Corresponding to Art. 21 of the Washington Regulations.

Art. 22.

and 20. The concluding words of Art. 18 (of 1863) were superfluous, and are omitted in the present Art. 22. The scope and application of the two Articles appear to be identical.

Art. 22 must be strictly observed.

Since a vessel, A., required by the Regulations to keep out of the way of another, B., may go ahead, or astern, or on either side of B., it is B.'s duty to do nothing that may embarrass A. or interfere with her right to keep clear of B. in any way she thinks fit. The rule, therefore, requiring B. to keep her course must be observed strictly. So long as B. can do so without immediate danger, and there is a possibility of A. clearing her, she must stand on. In a recent case Sir James Hannen refused to find a sailing ship to blame for taking no step until the last moment to avoid collision with a steamer which she saw to be taking no measures to keep out of the way (*y*). With reference to the same rule under a previous Act, Dr. Lushington said:—"I wholly deny that danger would be averted, or that infinitely greater danger would not occur, if a vessel close-hauled on the larboard tack, on descrying a steamer, were to take upon herself to deviate from her course for the purpose of getting out of the way; because I am of opinion that by so doing it would lead to the chance of infinitely more collisions than at present" (*z*). The Supreme Court of the United States is equally strict in its interpretation of the rule, and for the same reasons. "The negligence of one (ship) is liable to baffle the vigilance of the other; and if one of the vessels, under such circumstances, follows the rule, and the other omits to do so, or violates it, a collision is almost certain to follow" (*a*).

It has been held by the Privy Council that "if a ship bound to keep her course undertakes to justify her depar-

(*y*) *The Highgate*, 62 L. T. N. S. 841; *supra*, p. 433.

(*z*) *The Vivid*, 7 Not. of Cas. 127; *The Immaganda Sara Clasina*, *ibid.* 582; *The Test*, 5 Not. of Cas. 276.

(*a*) *New York and Liverpool U. S. Mail Co.* v. *Rumball*, 21 How. 372, 384.

ture from that rule, she takes upon herself the obligation of showing both that her departure was, at the time it took place, necessary in order to avoid immediate danger, and also that the course adopted by her was reasonably calculated to avoid that danger" (*b*). There are decisions of the Supreme Court of the United States to the same effect (*c*). Art. 22.

This rule is perhaps the most difficult of all the Regulations for seamen to adhere to. The stringency with which it is applied by the Courts makes it necessary for an officer to take his ship into close proximity to another, where it may appear that risk of collision would be at once determined by directing her course away from the other ship.

In the case of a sailing ship, A., close-hauled on the port tack, approaching another, B., having the wind free on the starboard tack within the "crossing" rule (Art. 14), unless there are exceptional circumstances, and it is certain that B. will not keep out of the way, A. has no choice but to stand on (*d*).

Meaning of "keep her course."

It has been held that in a winding river the direction to "keep her course" does not mean that the ship is to continue going ahead in the direction in which her head happens for the moment to be pointing, without regard to other circumstances. It means that she is to continue the course she would pursue if the other vessel were not in sight (*e*). Thus, a vessel rounding a point in a river, and approaching another under circumstances which require

(*b*) *The Agra* v. *The Elizabeth Jenkins*, L. R. 1 P. C. 501; see also *The Great Conquest* v. *The David Cannon*, Holt, 235; *The Uncas* v. *The Mœander*, Holt, 243; and see the observations of Dr. Lushington in *The Test*, *ubi supra*.

(*c*) *The Scotia*, 14 Wall. 170; *The Potomac*, 8 Wall. 590.

(*d*) See *The Byfoged Christensen*, and *The William Frederick*, 4 App. Cas. 669; *infra*, p. 489; *The Illinois*, 13 Otto, 298; *The Highgate*, 62 L. T. N. S. 841. See also *supra*, p. 413, for a "hard case."

(*e*) *The Velocity*, L. R. 3 P. C. 44. In *The Banshee*, 6 Asp. M. C. 221, different opinions upon this point were expressed by members of the Court of Appeal.

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her to keep her course under Art. 22, must continue her course round the point in the usual track (*f*).

Whether an alteration of speed is an infringement of Art. 22.

Whether a ship required to keep her course is at liberty to alter her rate of speed, while risk of collision exists, seems doubtful. If by doing so she increases the risk, or embarrasses the other ship, she would probably be held in fault. In *The Beryl* it seems to have been held that an alteration of the rate of speed is not an infringement of Art. 22. The vessel required to keep her course was held free from blame, though she eased her engines whilst there was risk of collision, and though there would have been no collision but for the easing of the engines. The facts were as follows:—Steamships A. and B. were crossing at right angles, A. having B. on her starboard hand. When about a quarter or half-a-mile distant from A., B. whistled, and, finding that A. did not alter his course, eased his engines. Then A. eased, and, when close to B., stopped and reversed his engines, the collision being then inevitable. A. was held solely in fault (*g*). In the Court of Appeal (where B. was held also in fault for not stopping and reversing), Brett, M. R., said that Art. 22 relates entirely to the heading, not to the speed of the ship. "Keeping her course means that she is to keep on the same direction as before; it has nothing to do with the question of speed" (*h*). In *The Leverington* (*i*), the steamship required to keep her course did so and "went on faster." She was held to have complied with Art. 22.

How a ship hove-to is to "keep her course;"

Where the vessel required to keep her course is hove-to, it appears to be the duty of those on board to fill on her

(*f*) *The Velocity*, *supra*; *The Esk* and *The Nord*, L. R. 3 P. C. 436; *The Cologne* and *The Ranger*, L. R. 4 P. C. 519. See *supra*, p. 427. See also *The John Taylor*, *infra*, p. 479.

(*g*) *The Beryl*, 9 P. D. 4.

(*h*) *Per* Brett, M.R., *The Beryl*, 9 P. D. 137, 140. This dictum was doubted by Butt, J., in *The Marmion*, Ad. Div. 9th Dec. 1887. The Washington Regulations, Art. 21, require the ship to "keep her course *and speed*."

(*i*) 11 P. D. 117.

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and get her under command without altering her course more than is necessary (*k*).

A vessel hove-to with her helm lashed to leeward, forging ahead as she comes to and falls off, does not fulfil the requirements of Art. 22 (*l*).

and a ship by the wind.

A vessel close-hauled does not by luffing a little, and so that she does not lose her headway, break the rule requiring her to keep her course (*m*); nor, it is submitted, does she infringe Art. 22, by breaking off if the wind heads her (*n*). But a vessel which luffed to the extent of two and a-half points, was held to have infringed the regulation (*o*). And it has been held that a vessel does not, by altering her course so as to give an overtaking ship more room to pass, infringe the rule (*p*). If a close-hauled ship departs from the rule requiring her to keep her course, as a general rule she should luff rather than bear up, as she thereby lessens her way, and, if a collision takes place, its effect is likely to be less disastrous (*q*).

A ship must not stand on obstinately.

The rule that a ship is to keep her course does not mean that she is to do so obstinately when she sees that, under the particular circumstances of the case, she can, by departing from it, avoid a collision (*r*).

Cases illustrating the application of Art. 22.

The following cases illustrate the application of Art. 22:

A barque in Margate Roads in a strong wind was wearing preparatory to coming to an anchor. A steamship was held solely in fault for a collision with her, although the

(*k*) *The General Lee*, 3 Mar. Law Cas. O. S. 204.

(*l*) *The Transit*, 3 Bened. 192; and see further, p. 415, above, as to the duty of a ship hove-to.

(*m*) *The Marmion*, 1 Asp. Mar. Law Cas. 412; *The Aimo* and *The Amelia*, 2 Asp. Mar. Law Cas. 96; *The Great Eastern*, 3 Moo. P. C. C. N. S. 31; *The Singapore*, L. R. 1 P. C. 378.

(*n*) She would be in fault if she broke off more than necessary; as in *The Elizabeth Jones*, 5 Davis, 514.

(*o*) *The Earl Wemyss*, 6 Asp. 364; on app. 61 L. T. N. S. 289.

(*p*) *The Franconia*, 2 P. D. 11; but see *The Corsica*, 9 Wall. 630; *infra*, p. 479.

(*q*) *The Agra* and *The Elizabeth Jenkins*, L. R. 1 P. C. 501; *The Great Eastern*, *ubi supra*.

(*r*) *The Lake St. Clair* v. *The Underwriter*, 3 Asp. Mar. Law Cas. 361; *The Rosalie*, 5 P. D. 245; *The Sunnyside*, 1 Otto, 208. See, however, *infra*, Art. 23.

Art. 22. steamship alleged that she was baffled by the rapid change in the course and lights of the barque (*s*).

A sailing ship, with the wind aft, meeting a steamship nearly end on, was held in fault for porting (*t*). But a slight alteration in the helm of a sailing ship, when an approaching steamship was two miles distant, was held not to be an infringement of the rule requiring her to keep her course (*u*). And a steamship, with another a quarter of a mile astern on her port quarter and overtaking her, was held not to be in fault for porting half a point (*x*).

A sailing ship must not go about close ahead of a steamship, so as to embarrass the latter and make it difficult for her to keep out of her way (*y*). But a steamship, attempting to pass a sailing ship turning to windward in a narrow channel, must be prepared for the sailing ship going about, and the latter is under no obligation to give notice of her intention to go about (*z*).

It seems that where risk of collision exists, a sailing ship is not entitled to go about until compelled to. Then Art. 23 applies, and excuses her for not keeping her course. A three-masted schooner was standing in towards the Goodwin Sands on the port tack, heading W. by S. Approaching her was a steamship on a S.S.W. course, having the schooner about one point on her starboard bow, and under such circumstances that there was risk of collision. The schooner went about, and there was a collision. The question was, whether the schooner had infringed Art. 22. The opinion of the Trinity Masters was asked by Butt, J., in these terms:—Would there have been any

(*s*) *The Monsoon* and *The Neptune*, 2 Mar. Law Cas. O. S. 289; and see *The Falkland* and *The Navigator*, Br. & Lush. 204.

(*t*) *The Bougainville* and *The James C. Stevenson*, L. R. 5 P. C. 316.

(*u*) *The Norma*, 3 Asp. Mar. Law Cas. 272; cf. *The Banshee*, 6 Asp. Mar. Law Cas. 221.

(*x*) *The Franconia*, 2 P. D. 8.

(*y*) *The Newburgh* v. *The Oscar*, Holt, 231; *The Saucy Lass* v. *The Bolderaa*, Holt, 205.

(*z*) *The Palatine*, 1 Asp. Mar. Law Cas. 468; it is not quite clear in this case whether it was necessary for the sailing ship to go about when she did.

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risk to the schooner, having regard to the tide (running to the westward) and all the surrounding circumstances, if she had stood further in towards the sands? The answer to this question being in the affirmative, it was held that Art. 23 applied, and that the schooner had not infringed the Regulations in going about (*a*).

In a Canadian case a sailing ship in tow with sail set was struck on the quarter by another vessel in tow of the same tug, and was forced against an overtaking steamship (*b*). She was held in fault for not keeping her course; *sed qu.* as to the reason of the decision.

A smack hove-to on the port tack, with her helm lashed, was heading so as to cross the course of a three-masted schooner close-hauled on the starboard tack. Neither vessel did anything until the collision was inevitable. The schooner, as well as the smack, was held in fault, because she did not bear up in time (*c*).

American cases.

In America there is a stringent rule, which has been frequently insisted upon by the Courts, requiring a sailing ship working to windward in company with other ships, whose duty it is to keep out of her way, to "beat out her tack." If she goes about in a narrow channel before the shoaling of the water or other dangers of navigation require it, and comes into collision with another ship which would have cleared her if she had stood on, she is held to be in fault for the collision (*d*). In a case of collision between a sailing ship turning to windward and a steamship, the Circuit Court said: "What the law requires for a sailing vessel in a narrow channel is, to beat out her tack, and, having beat it out, to come about with all proper despatch upon the other, leaving to the steam vessel the responsibility of being in a position to enable her to do so without danger" (*e*).

(*a*) *The Orwell*, Ad. Div. 17th Dec. 1887.

(*b*) *The Farewell*, 8 Quebec L. R. 87.

(*c*) *The Rosalie*, 5 P. D. 245.

(*d*) *The Empire State*, 1 Bened. 57.

(*e*) *The Empire State*, *ubi supra*.

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American cases illustrating Art. 22.

In a case where it was proved that there was, at the time of the collision, a flat calm, it was held by the Supreme Court that the sailing ship, whose duty it was to keep her course, could not be in fault (*f*).

The rule requiring a vessel to keep her course is strictly enforced by the Courts in the United States. A sailing ship approaching a steamship admitted that so soon as there was risk of collision she kept away two or three points. She was held to be in fault. The Court said (*g*): "A vessel whose duty it is to keep her course has no *right* to change it as soon as she apprehends a collision. In this case the duty of the tug to keep out of the way of the lighter arose only when the two vessels were proceeding in such directions as to involve risk of collision; and it was under the same circumstances that the duty arose on the part of the lighter to keep her course. Therefore, under the statute requiring the lighter to keep her course, her apprehension of a collision could not justify her in changing her course. Moreover, it is the actual risk or danger of collision that determines the duty of both vessels, and not the apprehension merely (*h*). The rule was made and is administered for the very purpose of preventing the vessel charged with the duty of avoiding the other from being embarrassed by a change of course on the part of the other into danger, on the apprehension that such duty of avoidance will not be fulfilled" (*i*).

A schooner, seeing the mast-head light of a steamship, and mistaking it for a light ashore, hove-to to get a cast of the lead, thereby presenting her red light to the steamship. The steamship ported. The schooner, on discovering her mistake, got under way, and crossed the course of the

(*f*) *The Commerce*, 16 Wall. 33.

(*g*) *The General U. S. Grant*, 6 Bened. 465, 467; and see *The Adriatic*, 17 Otto, 512, as to the duty of a sailing ship to keep her course.

(*h*) But see as to this, *supra*, p. 348.

(*i*) See also *The Stephen Morgan*, 4 Otto, 599.

steamship, showing her green light. It was held that the schooner was solely in fault for not keeping her course (*k*). Art. 22.

Where a ferry boat crossing a river was under a port helm at the moment when she sighted another steamship coming up the river, it was held that her duty, under the rule requiring her to keep her course, was to continue in her usual track (*l*).

The danger of departing from Art. 22 is illustrated by an American case, where a vessel, A., starboarded in order to assist another, B., whose duty it was to keep out of her way, in an attempt to cross her bows. Finding that she could not cross A.'s bows, B., at the last moment, stopped. In consequence of B.'s stopping and A.'s starboarding, a collision occurred. A. was held to be solely in fault (*m*).

A steamship, just before reaching a point in New York harbour where the channel is narrow and the navigation difficult, sighted a schooner's red light. There were three channels open for the schooner, and only one for the steamship. The schooner selected the steamship channel, and a collision took place. The schooner was held in fault, because, although she kept her course, in the sense that she had from the first intended to make use of the steamship channel, she embarrassed the steamship by taking that course when she might have avoided any risk by taking one of the other channels (*n*).

It has been decided by the Supreme Court that a sailing ship is not free from blame if, seeing the lights of a steamship ahead and not keeping out of the way, she pertinaciously keeps on her course and runs down the steamship (*o*).

(*k*) *The Virgo*, 7 Bened. 495.
(*l*) *The John Taylor*, 6 Bened. 227.
(*m*) *The Corsica*, 9 Wall. 630.
(*n*) *The City of Hartford*, 7 Bened. 350.
(*o*) *The Sunnyside*, 1 Otto, 208.

Article 23 (*oo*).

Art. 23. Proviso saving special cases.

In obeying and construing these rules due regard shall be had to all dangers of navigation, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

Art. 23 corresponds, and, with the exception of superfluous words, is identical, with Art. 19 of the Regulations of 1863, and with Art. 23 of the Regulations of 1880.

Terms of Art. 23 compared with those of 36 & 37 Vict. c. 85, s. 17.

The concluding words of this article should be compared with those of 36 & 37 Vict. c. 85, s. 17, which raises a presumption of fault in case of infringement of the Regulations—"unless it is shown to the satisfaction of the Court that the circumstances of the case made departure from the Regulations necessary" (*p*). It is clear, from Art. 23, that the steering and sailing rules—Arts. 14, 15, 16, 17, 18, 20, and 22—do not apply where they cannot be obeyed without "immediate danger." The "circumstances" mentioned in 36 & 37 Vict. c. 85, s. 17, would therefore seem to be such as render a departure from the Regulations necessary to avoid immediate danger. It may be objected that in this view the words of s. 17, above quoted, "unless it is shown, &c.," have no operation and are superfluous; but it is difficult to give them any other meaning.

The construction, here suggested, of Art. 23 and sect. 17, seems to have been that adopted by the House of Lords in the cases of *The Khedive* (*q*) and *The Benares* (*r*). In the latter case the meaning and operation of Art. 23 was more considered, and a larger and more decided operation was given to it by the Court of Appeal, than in *The Khedive* by the House of Lords. In *The Benares* it was held that where

(*oo*) Corresponding to Art. 27, Washington Regulations.

(*p*) See p. 38, above, as to the effect of this enactment.

(*q*) 5 App. Cas. 876.

(*r*) 9 P. D. 16. As to these cases, and generally as to 36 & 37 Vict. c. 85, s. 17, see above, pp. 38—60.

there is one and only one "chance of escape," Art. 23 justifies a seaman in taking the course which gives him the benefit of that chance, although it necessitates a departure from one of the preceding Articles. It must, however, be admitted that it is difficult to reconcile this construction of Art. 23 with the *ratio decidendi* in *The Khedive*, and particularly with the observations of Lord Watson (*s*) in that case. Those observations appear to set forth the principle upon which the decision in *The Khedive* proceeded; and, though made with reference to Art. 19 of the Regulations of 1863, are applicable to the existing Art. 23 (of 1884). They are as follows: "There is nothing in the case to suggest the existence of any danger of navigation, a due regard to which would have led to a disregard of the 16th rule (*t*). The only existing danger was the very danger to which the rule (*u*) applies, and to prevent which it was enacted. And there is just as little room for the suggestion that there existed any special circumstances which rendered it necessary for *The Khedive* to continue at full speed, instead of slowing or stopping or reversing, in order to avoid immediate danger." Art. 23.

The important distinction between *The Khedive* and *The Benares* must, however, not be lost sight of. In the former case the ship, which was held in fault, under sect. 17, for having infringed the Regulations, did what was in fact the *wrong* thing in point of seamanship, and thereby, probably, caused the collision. In *The Benares* the ship did what from a seaman's point of view, and apart from the Regulations, was the right thing; and though in the result it failed to avert a collision, it did not cause the collision, which was, from the first, inevitable. The difficulty suggested by the two cases is that, although in neither of them was there negligence on the part of those on board, in the one

(*s*) 5 App. Cas. 902. See also *per* Lord Blackburn, 5 App. Cas. 895.

(*t*) Of 1863.

(*u*) Art. 16 of 1863.

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case the House of Lords held that the Regulations had been infringed, in the other the Court of Appeal held that they had not been infringed.

Regulations never to be departed from except for necessity.

It is sometimes attempted to urge this Article as an excuse for a departure from the Regulations, where an adherence to them would have prevented a collision. In such a case Art. 23 has no application; nor does it in any way affect the universal application of the Regulations where it is possible to apply them so as to avert collision. This is well illustrated by the case of *The Khedive* (*x*). There a steamship was suddenly put into a difficulty, and risk of collision was caused, by the wrong manœuvre of another steamship approaching her. The former stopped her engines, but did not immediately reverse, though she did reverse before the collision. By not reversing immediately the officer in charge did not show himself wanting in ordinary care, skill, or nerve, though he committed an error of judgment. It was held that he had departed from the Regulations.

Safety attained by their uniform and exact observance.

A vessel is not justified in departing from the Regulations because she fears that the other ship will not comply with them. In a case decided under the Trinity Rules of 1840, Dr. Lushington thus laid down the general principle: "I cannot conceive that anything would be more likely to lead to mischievous consequences than to suppose that a vessel whose duty it is to keep her course should anticipate that another vessel will not give way, and so give way herself. The consequence would be that there would be no certainty; whereas the doctrine I have upheld, supported by your (*i. e.*, the nautical assessors') authority, is that in cases of this description you ought always to follow the general rule. The certainty which results from adherence to general rules is, in my opinion, absolutely essential to the safety of navigation" (*y*). Again: "All rules are

(*x*) 5 App. Cas. 876.
(*y*) *The Test*, 5 Not. of Cas. 276; see also *The Superior*, 6 Not. of Cas. 607.

framed for the benefit of ships navigating the seas, and no doubt circumstances will arise in which it would be perfect folly to attempt to carry into execution every rule, however wisely framed. It is, at the same time, of the greatest possible importance to adhere as closely as possible to established rules, and never to allow a deviation from them unless the circumstances which are alleged to have rendered such a deviation necessary are most distinctly proved and established; otherwise vessels would always be in doubt and doing wrong" (*z*). Art. 23.

The case of *The Superior* (*a*), decided under the Trinity House Rule of 1840, is a strong one, as showing the necessity of observing rules of navigation wherever it is possible to do so. A. was a brig bound down the Thames against the flood-tide, with the wind free. B., a brig bound up the river, was required by the Trinity Rule (*b*) to pass to the northward of A. Close ahead of A. was a schooner, which, in violation of the Trinity Rule, passed to the northward, or inside B. Expecting that A. would follow in the wake of the schooner and pass inside, B. starboarded, and in attempting to pass outside or to the southward of A., came into collision with her. B. alleged that there was no room for her to pass between the schooner and A. It was held that the fact of the schooner having safely passed B. on the wrong side—of her having violated the rule with impunity—was no justification to B. for herself violating the rule, in the expectation that A. would not obey the rule, but would follow the schooner, and pass inside. *The Superior.*

In *The Khedive* (*c*), before the House of Lords, the safety which arises from universal obedience to the Regulations,

(*z*) *The John Buddle*, 5 Not. of Cas. 387; cf. *The Great Eastern*, 3 Moo. P. C. C. N. S. 31.

(*a*) 6 Not. of Cas. 607.

(*b*) It does not clearly appear whether she had the wind free or was close-hauled. In either case her duty as to passing to the northward of the other ship was the same.

(*c*) *Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Co.*, *The Khedive*, 5 App. Cas. 876, 895, 904, 909.

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where it is possible to obey them without causing a collision, is strongly insisted upon. They must, it was said, be complied with, although in the particular case it may seem to be better seamanship not to do so. "These rules . . . . . are general rules," said Lord Hatherley, "to be adopted by all persons having charge of the navigation of vessels, with the exceptions which have been pointed out (as to immediate danger). This rule (as to stopping and reversing) is not laid down merely for the sake of the vessel commanded by the man who breaks it, but for the sake of the vessel commanded by the man approaching at a distance, and who has no right or reason to suppose that he will break it. If the rule is observed, every person will know precisely what he is to do, and will say, 'I will carry out my directions entirely with that knowledge.' On the other hand, if the Court allows these rules to be lightly departed from, the result will be the very evil which the Act was intended to prevent." And in the same case, Lord Watson (*d*) said:—"It was the deliberate policy of the legislature to compel sea captains, where their vessels are in danger of collision, to obey the rule (Art. 16 of 1863), and not to trust to their own nerve and skill."

At the date of the observations of Dr. Lushington in the case cited above (*e*), there was in force no enactment or rule corresponding to Art. 23. A saving clause restraining the indiscriminate application of the statutory rules of navigation first appears in 17 & 18 Vict. c. 104, s. 296. An Article to the same effect (Art. 19) is included in the Regulations of 1863. The purpose of such an enactment clearly is to provide for cases where a literal compliance with the general rules would cause a collision. The stringency of the existing Regulations would seem to be greater than that of the (1840) Trinity House Rule of port helm. In *The Friends* (*f*), Lord Campbell said that that rule

(*d*) 5 App. Cas. p. 904.
(*e*) P. 482.
(*f*) 4 Moo. P. C. C. 314, 320.

applied only where, by its application, a collision "may probably be avoided"

Art. 23 prevents the Regulations being applied so as to cause collision.

Of the corresponding Article of the former law Dr. Lushington said that it was not a directory enactment, telling persons to do this or that, but that it released them from the severe obligation of complying with the previous Articles under circumstances which would render obedience to them dangerous, when, by deviation, they might escape danger (*g*). But its application is strictly limited to cases where the circumstances are such that "there is immediate danger perfectly clear to the apprehension of those present" (*h*). It "does not prescribe any particular measures that should be adopted in departing from the strict terms of any of the previous Regulations that it governs, but it merely states that in construing and obeying these Regulations as far as possible you may take into consideration urgent attendant circumstances. . . . It is common sense; for if any rule were laid down by Act of Parliament, or any other authority, that could never be departed from in certain states of circumstances, such a rule would necessarily involve, on many occasions, the destruction of ships which it was intended to preserve" (*i*).

Duty to avoid collision, and for that purpose to depart from the Rule of the Road if necessary.

Not only is departure from the rule of the road excused by Art. 23, where the rule cannot be obeyed without collision, but a literal observance of the Regulations cannot be set up as a defence where the collision might have been avoided by ordinary care (*k*). "When one person neglects his duty, and so puts another into danger, the second is not justified in doing nothing to avert that danger, though

(*g*) *The Eliza* and *The Orinoco*, Holt, 98. See *The Concordia*, L. R. 1 A. & E. 93, 97.

(*h*) *The Allan* and *The Flora*, Holt, 114; 2 Mar. Law Cas. O. S. 386; *The Moderation*, 1 Moo. P. C. C. 528.

(*i*) *Per* Dr. Lushington in *The Allan* and *The Flora*, *ubi supra*; and see *The Superior*, *ubi supra*. The Supreme Court of the United States used similar language with regard to the operation of Art. 19 of the Regulations of 1863 in *The Cayuga*, 14 Wall. 270; *The Sunnyside*, 1 Otto, 208.

(*k*) See further on this, *supra*, p. 22.

Art. 23. it is caused entirely by the fault of the first" (*l*). "You may depart, and you must depart, from a rule if you see with perfect clearness, almost amounting to certainty, that adhering to the rule will bring about a collision, and violating a rule will avoid it; and, indeed, this is provided for by the 19th Article" (of the Regulations of 1863, corresponding to Art. 23 of 1884) (*m*). And, again, "you have no right to stand in a difficulty upon a right, though it may be a perfectly good right, obstinately, recklessly, and regardless of the safety of others" (*n*). Art. 23, in fact, merely states the general principle, which, it is submitted, would prevail in the absence of such an enactment. The principle was thus stated by Best, C. J.:—"Although there may be a rule of the sea, yet a man who has the management of one ship is not to be allowed to follow that rule to the injury of a vessel of another, where he could avoid the injury by pursuing a different course" (*o*).

A barque close-hauled on the starboard tack was held to be solely in fault for a collision with a barque that had just been in stays, and had not gathered way on the port tack. The Court (in Ireland) said that if a ship insists on her right, under a rule of navigation, of not giving way, and makes no effort to prevent the collision when it is in her power to do so, she will be held not to have performed her duty, and to be in fault for the collision (*p*). So a ship on the port tack was (in 1850) held in fault for a collision with another having the wind free, which she had seen a mile-and-a-half off and did not attempt to avoid (*q*); and more recently a schooner on the starboard tack was held

(*l*) *Per* Brett, L.J., *The Jane Bacon*, 27 W. R. 35.

(*m*) *Per* Dr. Lushington, in *The Boanerges* and *The Anglo-Indian*, 2 Mar. Law Cas. O. S. 239. See also *The Ida* and *The Wasa*, *infra*; *Handayside* v. *Wilson*, 3 Car. & P. 528; *The Lady Anne*, 15 Jur. 18.

(*n*) *The Legatus* and *The Emily*, Holt, 217.

(*o*) *Handayside* v. *Wilson*, 3 Car. & P. 528; see also *Mayhew* v. *Boyce*, 1 Stark. 423.

(*p*) *The Ida* and *The Wasa*, 2 Mar. Law Cas. O. S. 414.

(*q*) *The Commerce*, 3 W. Rob. 287; but see the observations of Sir J. Colville on this case, 4 App. Cas. 672.

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in fault for doing nothing before she came into collision with a smack hove-to on the port-tack (*r*).

The Lady Anne, close-hauled on the starboard tack, was meeting another ship, close-hauled on the port tack. It was held that *The Lady Anne* might have avoided the collision by putting her helm down at the last moment and easing off her head sheets, and she was held in fault for not doing so (*s*).

So a sailing ship will be held in fault for a collision with a steamship if she makes no attempt to avoid a collision, where it is clearly in her power to do so. In such a case a mere adherence to Art. 22 is no justification. In *The Sunnyside*, a sailing ship, with the wind free, saw the mast-head and green lights of a steamship half a point on her port bow, a considerable distance off. The lights were those of a tug, drifting before the wind, at about a mile-and-a-half an hour, and waiting for employment. The sailing ship kept her course, and did not alter her helm until it was too late to avoid the tug. It was held in America by the Supreme Court that the sailing ship was in fault, as well as the tug (*t*). In *The Zadok* (*u*), a sailing ship was held in fault for a collision in a fog with a steamship, because, amongst other acts of negligence, after she heard the whistle of the steamship approaching, she had no hands stationed at the braces ready to let them go so as to assist the helm when the steamship came into sight at close quarters.

The Tasmania (*x*), a steamship going three and a-half knots, saw the red light of another steamship one mile or more distant, and two points upon her port bow. When the latter was about four ships' lengths off, the green came

(*r*) *The Rosalie*, 5 P. D. 245.
(*s*) 15 Jur. 18.
(*t*) *The Sunnyside*, 1 Otto, 208; but see *The Bougainville* v. *The James C. Stevenson*, L. R. 5 P. C. 316, for a case of premature alteration of her course by the sailing ship.
(*u*) 9 P. D. 114.
(*x*) 15 App. Cas. 223, reversing 14 P. D. 53.

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into view. No alteration in speed or helm was made until the hull of the other ship was seen. The question was whether *The Tasmania* was in fault under Art. 23, for not having altered her course before the collision. After different decisions in the Courts below, the House of Lords held that she was not in fault (*x*). And in *The Highgate* (*y*), Sir James Hannen distinguished the then subsisting decision of the Court of Appeal in *The Tasmania*, and refused to hold a sailing ship in fault for not taking any step to avoid an approaching steamer until collision was imminent, saying that, "It is only where a clear case of necessity is made out that a captain can excuse himself for not following the rule."

Great caution necessary in departing from the Regulations.

Great caution must be used in applying the principle recognized in some of the above cases, that under some circumstances it is the duty of a ship to disobey the Regulations. It may be applied only where the circumstances are very exceptional. "The principle of law that you are not to adhere to strict rules of navigation, but avoid an accident if possible, is a doctrine to be very carefully watched" (*z*). The Court will not hold a ship in fault for not departing from the Regulations in a case where they were *primâ facie* applicable, and the other ship failed to comply with them, unless it is clearly proved that those on board the first ship might with reasonable care have seen that the other ship was not going to comply with the Regulations; and further, that they should have seen this at a time when it was in their power to avoid the collision.

A ship, A., close-hauled on the port tack, and another, B., on the starboard tack with the wind free, were crossing within Art. 12 of the Regulations of 1863. A. stood on until immediately before the collision, when she luffed.

(*x*) 15 App. Cas. 223, reversing 14 P. D. 53.

(*y*) 62 L. T. N. S. 841. More fully referred to, *supra*, p. 433.

(*z*) *Per* Dr. Lushington, *The Test*, 5 Not. of Cas. 276.

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B. neglected to keep out of the way, as required by the Regulations. It was held by the Gibraltar Court that A. was in fault as well as B., because she pertinaciously kept her course under Art. 18 when she ought to have seen that B. was not going to keep out of the way in compliance with the law; and in so deciding, the learned judge relied on *The Commerce* (*a*). The Privy Council reversed the decision of the Court below, and held that A. was not in fault. Sir J. W. Colville, in delivering the judgment of the Privy Council, said: "Their lordships remark that, though the principle involved in that case (*The Commerce*) may be in itself a sound one, it is one which should be applied very cautiously, and only when the circumstances are clearly exceptional. They conceive that to leave to masters of vessels a discretion as to obeying or departing from the sailing rules, is dangerous to the public; and that, to require them to exercise such discretion, except in a very clear case of necessity, is hard upon the masters themselves, inasmuch as the slightest departure from these rules is almost invariably relied on as contributory negligence" (*b*).

If the Regulations cannot be complied with, or cannot, if complied with, prevent the collision, Art. 23 does not apply.

Art. 23 is not intended to apply to a case where the Regulations cannot be complied with, nor to a case where non-compliance could not by possibility have caused the collision. In such a case non-compliance with the Regulations is immaterial upon the question which ship is in fault, but that is so by virtue of the general law, and not under Art. 23 (*c*). But it appears that where the collision, though in fact inevitable, may, in the opinion of a seaman of ordinary skill, be avoided by departing from the Regulation (*d*) which is *primâ facie* applicable, the

(*a*) 3 W. Rob. 287.

(*b*) *The William Frederick* and *The Byfoged Christensen*, 41 L. T. N. S. 535; 4 App. Cas. 669; and see *The Legatus* and *The Emily*, Holt, 217.

(*c*) See *Inman* v. *Beck*, *The City of Antwerp* and *The Friederich*, L. R. 2 P. C. 25, 34; and *supra*, p. 431.

(*d*) *The Benares*, 9 P. D. 16.

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ship will not be held in fault for a departure from the Regulations merely because the collision has occurred (*e*).

"Dangers of navigation."

By the terms of Art. 23, in applying the Regulations, regard is to be had to the "dangers of navigation." This phrase seems to refer primarily to dangers other than collision; but it is not clear that risk of collision is not included (*f*).

A ship is not bound to take a step dangerous to herself.

Nothing in the Regulations requires a ship to take a measure which is dangerous to her safety (*g*). A vessel is not bound to obey the rule requiring her to port, if, by porting, she will incur serious danger by going ashore (*h*), or striking another ship (*i*). In such a case Art. 23 may apply to both vessels, or to one of them. It excuses non-compliance with the Article requiring her to port on the part of the one vessel, because of the rock or shoal; and if, in order to avoid a collision, it is necessary for the other vessel to depart from the Regulations, it is her duty to do so, and Art. 23 excuses her departure.

"Special circumstances."

So, where a ship required by the Regulations to keep out of the way is unable to do so, it is the duty of the other, not to keep her course, but herself to keep out of the way. Two vessels, close-hauled on opposite tacks, were crossing, and the ship on the port tack could not bear up for fear of collision, and could not go about because of a shoal. It was held (in America) that the ship on the starboard tack was in fault for not keeping out of the way (*k*).

Disabled ship.

If a vessel is partially disabled, or in a condition which

(*e*) See *The Khedive*, 5 App. Cas. 876, 902.

(*f*) See *The Benares*, 9 P. D. 16. In *The Maggie J. Smith*, an American case, 16 Davis U. S. 349, at p. 354, Field, J., says Art. 24 (the corresponding Article) only applies where there is some special cause rendering a departure necessary to avoid immediate danger, such as the nearness of shallow water or a concealed rock, the approach of a third vessel, or something of that kind.

(*g*) *The St. Cyran* v. *The Henry*, Holt, 72.

(*h*) *The Lucia Jantina* v. *The Mexican*, Holt, 130.

(*i*) *The Concordia*, L. R. 1 A. & E. 93.

(*k*) *The Ann Caroline*, 2 Wall. 538.

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prevents her answering her helm readily, she must take precautions in time, and do all she can to comply with the Regulations effectually (*l*). A brig hove-to, reefing topsails, was held in fault for not porting (*m*). Where a ship had no head sail on her, and the Regulations required her to bear up, it was held that it was the duty of those on board to take the after sail off her, so that she might be better able to bear up (*n*).

If it appears that a vessel is unable to comply with the Regulations owing to her being disabled, or in stays, or for other reasons, it is the duty of those on board the other to watch her closely. They have no right to speculate on the disabled ship being able to keep out of the way, but they should themselves at once take steps to make the collision impossible (*o*).

It was held in America that the fact of a schooner's flying-jib being carried away was no excuse for her not bearing up; and that the other ship was not in fault because she failed in the daytime to see that the schooner was partially disabled (*p*).

Necessity of departure from the Regulations must be proved.

To justify a departure from the Regulations which is alleged to have been necessary to avoid immediate danger, there must be clear proof that an adherence to them would have caused such danger, and also that the step taken was the right step (*q*). It is not enough to show that, if the approaching ship had taken one manœuvre when others were open to her, obedience to the Regulations would have increased, instead of diminishing, the risk of collision. Therefore, where the steamship *San Salvador* was approaching the steamship *Memnon* on a crossing course,

(*l*) *The Test*, 5 Not. of Cas. 276.

(*m*) *The Blenheim*, 1 Sp. E. & A. 285.

(*n*) *The Calcutta*, 3 Mar. Law Cas. O. S. 336.

(*o*) *The Priscilla*, L. R. 4 A. & E. 125; *The Eclipse* and *The Royal Consort*, Holt, 220; see also the *Ch. Raab*, Brown, Adm. 453.

(*p*) *The H. P. Baldwin*, Brown, Ad. 300.

(*q*) *The Concordia* v. *The Esther*, *infra*; *The Planet* v. *The Aura*, Holt, 255; *The Emperor* v. *The Zephyr*, Holt, 24; and see *The Corsica*, 9 Wall. 630.

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having her on her own starboard bow, and taking no step to keep out of the way, and the speed of the latter was such that in the existing circumstances she would probably have passed safely across the former's bows, *The Memnon* was held in fault for not stopping her engines, although, had *The San Salvador* kept her course, the risk of collision would have been increased and not diminished by *The Memnon* slackening her speed (*r*). Where it is possible to comply with the Regulations, Art. 23 would be no excuse for departing from them. In a case under the Trinity Rules of 1840, it was held that it was no excuse for not observing the rules that the night was very dark, and that the other ship was not seen until she was very close (*s*).

Where two steamships were meeting in the Thames end on, and one starboarded in order, as was alleged, to clear a barge, in the absence of proof that the starboarding was necessary, she was held in fault for a collision with the other steamship (*t*). The obligation on a ship which seeks to justify a departure from the Regulations is heavy. She takes upon herself the obligation of showing both that the departure was necessary in order to avoid immediate danger, and also that the course adopted by her was reasonably calculated to avoid that danger (*u*).

Cases where departure from the Regulations held not justifiable.

The fact that a steam tug had a heavy ship in tow, and a strong wind and tide against her, was held not to justify her departing from the rule requiring her to keep out of the way of an approaching sailing ship (*x*). And where a large steamship of 1,356 tons had a disabled steamship of 1,495 tons in tow, and was fast to the latter by a tow rope and chain cables of such length that from the bow of the towing vessel to the stern of the other was nearly a quarter of a mile, it was held by the Privy Council that

(*r*) *The Memnon*, 6 Asp. 317; in Dom. Proc. 62 L. T. N. S. 84.
(*s*) *The Flint*, 6 Not. of Cas. 271.
(*t*) *The Concordia* and *The Esther*, L. R. 1 A. & E. 93.
(*u*) *The Agra* and *The Elizabeth Jenkins*, L. R. 1 P. C. 501.
(*x*) *The Warrior*, L. R. 3 A. & E. 553.

those circumstances did not justify a departure from the rule requiring steamships to keep out of the way of a sailing ship (*y*).

Two steamships on crossing courses (within Art. 16), both making for a pilot cutter, must keep clear of each other by observing the Regulations. The fact that they are both making for the cutter does not justify the steamship with the other on her starboard hand in neglecting to keep out of the way (*z*).

A sailing ship beating to windward ahead of a steamship is justified by Art. 23 in going about when she has stood in towards a sand ahead of her as near as is prudent, although, except for the danger of going ashore, it would be her duty to keep her course (*a*).

It seems that Art. 23 does not justify a departure from the Regulations on the ground that it was reasonable to expect that the force of the blow would thereby be diminished (*b*).

Convenience no excuse for departing from the Regulations.

Where a collision may be avoided by obeying the Regulations, it is not a sufficient excuse for departing from them that the collision might with equal safety and more conveniently have been avoided by one or both ships departing from the Regulations. Thus, where a steamship sighted another at a considerable distance, approaching her nearly end on and a little on her starboard bow, it was held that the law required her to port, and that she was in fault for starboarding, although by porting she would have had to cross the bows of the other ship (*c*).

A ship close-

If a ship that is close-hauled must, in order to avoid a

(*y*) *The American* and *The Syria*, L. R. 4 A. & E. 226; on appeal, L. R. 6 P. C. 127.

(*z*) *The Ada* v. *The Sappho*, 1 Asp. Mar. Law Cas. 475.

(*a*) *The Orwell*, *supra*, p. 477.

(*b*) *The Khedive*, 5 App. Cas. 876.

(*c*) *The Araxes* and *The Black Prince*, 15 Moo. P. C. C. 122. This case was decided under the Act of 1854; it is submitted that the decision would have been the same under the existing Regulations. The observations in *The Arthur Gordon*, Lush. 270, with regard to the duty of a sailing ship to keep out of the way of a tug and her tow, upon grounds of convenience, must be taken with caution.

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hauled, when required to depart from the Regulations requiring her to keep her course, should luff, if possible.

collision, either luff or bear up, it has been said that the more prudent course for her is to luff, if possible, "so as thereby to stop her way; and mitigate as far as possible the effects of a collision, if a collision should take place" (*d*).

Neither ship may depart from the Regulations on the chance of the other obeying them.

Although the steps which the Regulations require two vessels approaching with risk of collision to take are not necessary, in the sense that a collision would certainly be avoided by only one of the vessels obeying the Regulations, the law must be obeyed by both. A vessel departing from the Regulations will not be excused on the ground that the collision would have been avoided if the other vessel had not disobeyed the law. In such a case Art. 23 is no justification for either ship in departing from the Regulations. Thus, where two steamships were meeting end on, and a collision would not have occurred if either had put her helm to port, both were held in fault by the Supreme Court of the United States (*e*).

Combined operation of Art. 19 and Art. 23.

It remains to be decided what effect Art. 19 has upon the application of Art. 23. In America, where a "whistling" rule similar to that of Art. 19 has been in force for many years, it has been held that a steamship signalling to another that she intends to depart from the Regulations, and departing from them, is not in fault for such a departure if it was agreed to by the answering signal from the other ship. But strict proof was required that the assenting signal was given (*f*).

It would probably be held that where a ship is hailed by another to take a particular course, if she does so and a collision occurs, the latter could not be heard to say that the former was wrong for departing from the Regulations (*g*).

(*d*) *The Agra* and *The Elizabeth Jenkins*, L. R. 1 P. C. 501.

(*e*) *The America*, 2 Otto, 432.

(*f*) *The Milwaukee*, 1 Brown, Adm. 313.

(*g*) See above, p. 6, and cases there cited. Art. 28 of the Washington Regulations makes the helm signals compulsory.

No ship, under any circumstances, to neglect proper precautions.

Article 24 (*h*).

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Nothing in these rules shall exonerate any ship, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Besides observing the Regulations, proper precautions are to be taken in all cases.

This Article is identical with Art. 20 of the Regulations of 1863, and with Art. 24 of the Regulations of 1880. It seems difficult to attribute to it any legal effect. It was inserted in the Regulations, probably, *ex abundante cautelâ*, and as a declaration, not to be overlooked by seamen, of the legal consequences of negligence.

The omission by a vessel preparing to anchor to warn a ship astern of her position and intention was held neglect of a "precaution required by the special circumstances of the case" (*i*).

The duty of those in charge of a ship to navigate her with due regard to the ordinary rules of seamanship, and under special circumstances to depart from the Regulations, has been already referred to (*k*). What is required of seamen is ordinary skill and ordinary intelligence. Neither Art. 24, nor any other part of the Regulations, makes it their duty to foresee and provide against every accident. But where literal compliance with the Regulations is not enough to avoid a collision, all must be done that a seaman of ordinary skill and intelligence would do to keep clear of the other ship (*l*). Where, for example, an

Precautions required by the ordinary practice of seamen which have been recognised by the law.

(*h*) Corresponding to Art. 29 of the Washington Regulations.

(*i*) *The Philotaxe*, 3 Asp. Mar. Law Cas. 512. As to the duty of a ship in such a case, see *infra*, p. 503.

(*k*) See pp. 2, 213, 480, *seq.*, above.

(*l*) *The Jesmond* and *The Earl of Elgin*, L. R. 4 P. C. 1; *The City of Antwerp* and *The Friedrich*, *Inman* v. *Beck*, L. R. 2 P. C. 25.

Art. 24. alteration of the helm is not enough, the helm must be assisted by lowering the peak or letting go the foresheets (*m*). So, a vessel has been held in fault for not backing her yards (*n*).

The law as to what is proper care and skill in navigation, and what are precautions required by the ordinary practice of seamen, is illustrated by numerous decisions, some of which are here collected.

Look-out. First, as to look-out: If a ship is proved to have been negligent in not keeping a proper look-out she will be held answerable for all the reasonable consequences of her negligence. In an American case, where the look-out on board a schooner failed to report a steamer's light which could not be seen by the man at the wheel, the schooner was held partly in fault for the collision (*o*).

The look-out must be vigilant and sufficient according to the exigencies of the case. The denser the fog and the worse the weather the greater the cause for vigilance. A ship cannot be heard to say that a look-out was of no use because the weather was so thick that another ship could not be seen until actually in collision. In *The Mellona* (*p*), Dr. Lushington said:—"It is no excuse to urge that from the intensity of the darkness no vigilance, however great, could have enabled *The Mellona* to have descried *The George* in time to avoid a collision. In proportion to the greatness of the necessity, the greater ought to have been the care and vigilance employed."

In ordinary cases one or more hands should be specially stationed on the look-out by day as well as at night. They should not be engaged upon any other duty; and they should be stationed in the bows, or in that part of the ship from which other vessels can best be seen (*q*). On

(*m*) *The Lady Anne*, 15 Jur. 18; *The Stranger*, 6 Not. of Cas. 36, 38; *The Marpesia*, L. R. 4 P. C. 212; *The Ulster*, 1 Mar. Law Cas. O. S. 234; *The Zadok*, 9 P.D. 114, 117.

(*n*) *The James*, Swab. Ad. 55.

(*o*) *The Fanita*, 14 Blatchf. 545.

(*p*) 3 W. Rob. 7, 13.

(*q*) *The Diana*, 1 W. Rob. 131;

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board a Mersey ferry boat the proper place for the look-out was said to be on the bridge between the paddle boxes (*r*). When passing over a fishing ground a specially vigilant look-out must be kept to avoid fishing-boats (*s*). A vessel brought up in a frequented channel should have an anchor watch ready to sheer her clear of an approaching vessel, or to give her chain (*t*). For a large steamship going eleven knots off Dungeness, a crowded part of the English Channel, on a hazy night, the Privy Council considered that one hand on the look-out was not sufficient (*u*). It was held negligence that an anchor watch was not kept on board a ship at moorings in the river Tyne, the weather being bad and threatening (*x*).

Anchor watch.

On board a steamship in daylight in the Clyde, the pilot, an officer, and a hand (not properly qualified for the duty), were held to be a sufficient look-out (*y*).

The necessity in the Thames of a look-out on the forecastle head, to see craft low in the water under the ship's bows, was insisted upon in *The Hallett* (*z*).

Under the Regulations of 1863 it was held that a vessel was not necessarily in fault for not keeping a look-out astern on a clear night; although if she sees a vessel approaching her astern it is her duty to warn her of her

Look-out astern.

4 Moo. P. C. C. 11; *The Batavier*, 9 Moo. P. C. C. 286; *The Bold Buccleugh*, 1 Pr. Adm. Dig. 144; *The Glannibanta*, 1 P. D. 283; *The Belgenland*, 6 Davis, 355; see *The Morning Light*, 2 Wall. 550.

(*r*) *The Wirral*, 3 W. Rob. 56.

(*s*) *The Robert and Ann* v. *The Lloyds*, Holt, 55.

(*t*) See *Lack* v. *Seward*, 4 Car. & P. 106; *Vanderplank* v. *Miller*, M. & M. 169; and *The Masters* and *The Raynor*, Brown, Adm. 342; *The Marcia Tribou*, 2 Sprague, 17 (American cases).

(*u*) *The Germania*, 3 Mar. Law Cas. O. S. 269. In an appeal from the judgment of a Court of Enquiry, suspending a master's certificate for not having set two men on the look-out when running through a roadstead, the judges of the Admiralty Division said that there was nothing in the circumstances of the case to require more than one man on the look-out; and they reversed the decision of the Court of Enquiry. *The Mary* and *The Rowland*, Adm. Ct., 11th July, 1881; cited in Murton's Wreck Enquiries, p. 196.

(*x*) *The Pladda*, 2 P. D. 34.

(*y*) *Clyde Navigation Co.* v. *Barclay*, 1 App. Cas. 790, 798.

(*z*) Ad. Div. 9th August, 1887.

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danger (*a*). In America a vessel which damaged another by moving her propeller in dock was held in fault for not having a look-out astern (*b*). Under the existing Regulations a vessel omitting to show the stern light required by Art. 11 would probably be held in fault (*c*).

It is the duty of a ship with another in tow to keep an especially vigilant look-out, because the tow cannot always see ahead (*d*).

A vessel brought up under Delaware Breakwater was (in America) held solely in fault for a collision with a ship coming in for shelter. She had no watch on deck, and it was proved that, if there had been one, the collision might have been avoided. Apart from the collision itself, there was no evidence of negligence on the part of the vessel under way; and there was a heavy snow storm about the time she came in (*e*).

The obligation of keeping a sharper look-out than is ordinarily required by law may be cast upon a ship by a local rule of navigation. In the Thames, for example, a local rule of navigation requires a vessel, before rounding certain points, to ascertain whether there is any vessel approaching her in the opposite direction on the other side of the point (*f*).

Where a vessel in a river ran into another coming out of dock, it was held that the duty of the look-out was to see that the channel was clear; and that it was not negligence on his part not to have reported the vessel coming out of dock (*g*).

Where to keep a good look-out glasses are necessary, it would probably be held negligence not to use them (*h*).

(*a*) *The Earl Spencer*, L. R. 4 A. & E. 431; *The City of Brooklyn*, 1 P. D. 276.
(*b*) *The Nevada*, 16 Otto, 154.
(*c*) *Supra*, p. 391.
(*d*) *The Jane Bacon*, 27 W. R. 35.
(*e*) *The Clara*, 12 Otto, 200.
(*f*) *The Margaret*, 9 App. Cas. 873, 879.
(*g*) *The Calabar*, L. R. 2 P. C. 238.
(*h*) See *The Hibernia*, 2 Asp. Mar. Law Cas. 454.

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In an American case the use of a night-glass on board a steamer coming into harbour was held to be necessary (*i*).

American cases as to look-out.

The requirements of the law in America as to look-out have been stated in many cases in stringent terms. In *The Sunnyside* (*j*) the Supreme Court held that it is the duty of a sailing ship to watch the movements of an approaching steamship, in order that, if the steamship fails to comply with the law and keep out of the way, she may herself be able to avoid a collision.

In another case it was held that the absence of a look-out on board a vessel will cause her to be held in fault for a collision, unless it is proved that the other ship was seen as soon as it was possible to see her, and that the proper steps to avoid her were taken, and as soon as it was possible to take them (*k*).

The Supreme Court has held that the officer in charge of the deck is not a sufficient look-out. For a first-class ocean steamship two men with no other duty to perform constitute a proper look-out. They should be stationed forward in the ship's bows (*l*), or in the part of the ship from which other vessels can best be seen (*m*). The rule that there must be one or more men specially stationed on the look-out, and that the officer in charge or the man at the wheel is not sufficient, has been established by numerous cases (*n*).

In *The Ariadne* (*o*) the Supreme Court said that the rigour of the requirement as to an efficient look-out rises according to the speed and power of the vessel, and the chance of meeting other ships. Thus, a vessel entering a

(*i*) *The Ville Du Havre*, 7 Bened. 328.

(*j*) 1 Otto, 208. Cp. *The Manitoba* (a case of two steamships), 15 Davis, 97, *supra*, p. 444.

(*k*) *The Atlas*, 10 Blatchf. 459.

(*l*) *Chamberlain* v. *Ward*, 21 How. 548, 570.

(*m*) *The Morning Light*, 2 Wall. 550.

(*n*) *The Northern Indiana*, 3 Blatchf. 92; *The Comet*, 9 Blatchf. 323; *The Parkersburg*, 5 Blatchf. 247; *The Douglas*, Brown, Ad. 105; *The Nabob*, *ibid.* 115; *The Blossom* Olcott, 188.

(*o*) 13 Wall. 475.

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harbour at night should have all the crew on deck, and keep as sharp a look-out as is possible (*p*).

It has been held by the Supreme Court that the absence of a look-out was not excused by the fact that it was daytime; that all hands were engaged in reefing (*q*); or that they were repairing damage caused by an accident (*r*). The duty of ferry boats, and of vessels crossing the track of ferry boats, to keep a specially good look-out, has been insisted upon in many cases (*s*).

Sufficiency of the crew.

A vessel under way must have on board a sufficient crew to work her for the voyage on which she is engaged. It seems that the crew usual under the particular circumstances would be held to be sufficient. Thus, two hands have been held sufficient for a sailing barge in the Thames (*t*). When in dock or harbour she should be provided with sufficient hands to tend her, having regard to her position, the character of the dock or harbour, and to ordinary changes of the weather (*u*). A steamer having been found to blame for damaging with her propeller a barge that was properly moored astern of her, the barge was held also to blame for having no one on board: but for this omission the barge might at any rate have been beached, and the damage consequent on the collision diminished (*x*). Where a new ship was in collision on her trial trip, when she had not on board her full complement of officers and crew, she was not therefore held in fault, there being on board a sufficient crew to work her (*y*). It is negligence for the officer of a ship at moorings in a river to be ashore unnecessarily when the weather is bad and threatening (*z*).

(*p*) *The Scioto*, Davies, 359.

(*q*) *Catharine* v. *Dickinson*, 17 How. 170; *Thorp* v. *Hammond*, 12 Wall. 408; see also *The H. P. Baldwin*, Brown, Adm. 300.

(*r*) *Whitridge* v. *Dill*, 23 How. 448.

(*s*) *The America*, 10 Blatchf. 155; *Ince* v. *East Boston Ferry Co.*, 106 Massach. Rep. 149; and see *supra*, p. 407.

(*t*) *The Minna*, L. R. 2 A. & E. 97.

(*u*) *The Excelsior*, L. R. 2 A. & E. 268; *The Patriotto* and *The Rival*, 2 L. T. N. S. 301.

(*x*) *The Scotia*, 63 L. T. N. S. 324.

(*y*) *The Clyde Navigation Co.* v. *Barclay*, 1 App. Cas. 790.

(*z*) *The Kepler*, 2 P. D. 40.

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The officer in charge should be always on deck (*a*); he should not leave the deck in charge of a junior officer when another vessel is approaching, so as to involve risk of collision (*b*). In the case of a collision between sailing smacks, it being admitted that one of them was in fault, the other was held to be also in fault for not having more than one hand on deck, it being the opinion of the Elder Brethren that had there been two hands on deck the collision might have been avoided (*c*). In a fog there should be strength at the helm sufficient to alter the ship's course as quickly as possible on the order being given (*d*).

Keeping clear of ship at anchor.

A vessel under way is bound to keep clear of another at anchor. The rule seems to be the same in all cases where one of the ships is under way and the other, though not at anchor, is for any other reason unable to keep out of the way; as where she is fishing and fast to her nets, or in stays, or disabled (*e*). And it applies though the ship at anchor is brought up in the fair-way, or elsewhere in an improper berth. "It is the bounden duty of a vessel under way, whether the vessel at anchor be properly or improperly anchored, to avoid, if it be possible with safety to herself, any collision whatever" (*f*). If one ship is fast to the shore, or lying at established moorings, it can scarcely happen that the other would not be held in fault for the collision (*g*). Where a steamship in the daytime ran into a sailing ship brought up in a river 500 yards wide, it was held by an American Court that the steam-

(*a*) *The Arthur Gordon* and *The Independence*, Lush. 270.

(*b*) *The Khedive* and *The Voorwaarts*, 5 App. Cas. 876.

(*c*) *The General Gordon*, 63 L. T. N. S. 117.

(*d*) *The Europa*, 14 Jur. 627.

(*e*) See above, p. 31.

(*f*) *Per* Dr. Lushington in *The Batavier*, 2 W. Rob. 407; and see *The Dura*, 1 Pritch. Adm. Dig. 174; *The Marcia Tribou*, 2 Sprague, 17; but see *The Kjobenhavn*, 2 Asp. Mar. Law Cas. 213.

(*g*) See *The Secret*, 26 L. T. N. S. 670; and (American cases) *Culbertson* v. *Shaw*, 18 How. 584; *Portevaut* v. *The Bella Donna*, Newb. Adm. 510; *The Bridgeport*, 7 Blatchf. 361; 14 Wall. 116; *The Granite State*, 3 Wall. 310; *The Helen Cooper* and *The R. L. Mabey*, 7 Blatchf. 378.

Art. 24. ship was solely in fault, although the sailing ship was riding with her sails up, sheering about, and with no anchor watch (*h*).

A vessel hove-to is, it seems, under way, and is required to comply with the Regulations so far as she is able (*i*). She is, therefore, not justified in doing nothing, and relying upon the other to keep out of her way.

Ship at anchor, bringing up, or getting under way.

The following cases illustrate the requirements of the law as to the duty of a ship when coming to an anchor, when brought up, and when getting under way:—

Foul berth.

A ship in bringing up must not give another a foul berth. "If one vessel anchors there, and another here, there should be that space left for swinging to the anchor that in ordinary circumstances the two vessels cannot come together. If that space is not left, I apprehend it is a foul berth" (*k*). In an American case it was held that a ship at anchor is entitled to have room to swing, not only with the scope of cable which she has out at the time when the other ship takes up her berth, but with as long a scope as may be necessary to enable her to ride in safety (*l*).

If a ship gives another a foul berth she cannot require the latter to take extraordinary precautions to avoid a collision (*m*). It has been held that in the Mersey a cable's length between the two ships is a clear berth (*n*). This, however, cannot be laid down as a general rule, for at this distance a laden vessel riding to the tide might, in swinging, come dangerously close to a light vessel riding athwart the tide. And not only must a vessel not bring up so close to another as not to give her room to swing, but she must not bring up in such a place that she endangers the other ship. She should not bring up directly ahead, or in the

(*h*) *The Planet*, Brown, Adm. 124.
(*i*) *The Rosalie*, 5 P. D. 245, *supra*, p. 415.
(*k*) *Per* Dr. Lushington in *The Northampton*, 1 Spinks, 152, 160.
(*l*) *The Queen of the East* and *The Calypso*, 4 Bened. 103.
(*m*) *The Vivid*, 1 Asp. Mar. Law Cas. 601.
(*n*) *The Princeton*, 3 P. D. 90.

stream of another ship, having regard to the current and also to prevailing winds. If she brings up directly in the hawse of another ship, or elsewhere in the neighbourhood of another ship, there should be such a distance between them that if either of them drives or parts from her anchors she may have the opportunity to keep clear (*o*). Where a ship, in bad weather, took up a berth two cables' length to windward of another, in an anchorage where there was plenty of room, and then rode with only one anchor down and that not her best, she was held in fault for a collision with the ship to leeward, against which she was driven when her cable parted in a heavy squall (*p*). Where a vessel gave another a foul berth, and subsequently drove against her in a hurricane, it was held to be an inevitable accident (*q*). Art. 24.

If a vessel takes up a berth alongside another where she takes the ground and falls over and injures the other, she will be held in fault (*r*). A vessel voluntarily taking up such a berth in a dock does so at her own risk (*s*). So where two colliers were beached near each other for the purpose of discharging cargo, it was held that it was the duty of the last comer to moor head and stern, and in such a way as not to foul the other when the wind shifted (*t*).

In coming to an anchor caution must be used not to injure or embarrass other ships. A vessel rounding-to, so as to bring her head upon tide, should, before altering her helm, look round and see that all is clear, and that her manœuvre will not endanger other ships (*u*). Coming to an anchor.

A ship, having lost one anchor off Dungeness, in

(*o*) *The Cumberland* (Vice-Ad. Court, Lower Canada), Stuart's Rep. (1858), p. 75; *The Egyptian*, 1 Mar. Law Cas. O. S. 358.

(*p*) *The Volcano*, 2 W. Rob. 337; *The Maggie Armstrong* and *The Blue Bell*, 2 Mar. Law Cas. O. S. 318.

(*q*) *The Inniskail* and *The Secret*, 35 L. T. N. S. 819.

(*r*) *The Indian* and *The Jessie*, 2 Mar. Law Cas. O. S. 217; *The George* and *The Lidskjalf*, Swab. Adm. 117.

(*s*) *The Patriotto* and *The Rival*, 2 L. T. N. S. 301.

(*t*) *The Vivid*, 1 Asp. Mar. Law Cas. 601.

(*u*) *The Ceres*, Swab. Adm. 250; *The Shannon*, 1 W. Rob. 463; *The Philotaxe*, 37 L. T. N. S. 540.

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attempting to bring up in the Downs lost her second anchor, and drove foul of another vessel. It was held that, the weather being heavy, she was in fault for attempting, with only one anchor, to bring up ahead of another vessel without the assistance of a tug which she might have taken (*x*).

In coming to an anchor in a crowded roadstead or harbour, proper care must be used to shorten sail in time, and not to run in at too great speed. A vessel running into Stangate Creek, in the Medway, was held in fault for a collision caused by her running in under too great a press of sail (*y*).

Where a ship delayed taking up her berth until night, and in consequence of the darkness injured another, she was held in fault for not having brought up by daylight, when she might have done so in safety (*z*).

Where, in Hong Kong harbour, a collision might have been avoided if the starboard anchor had been let go, and it could not be let go because it was unshackled, it was held to be negligence not to have had the anchor ready (*a*).

By Art. 14 of the Convention contained in the First Schedule to the Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22), it is illegal for a fishing boat to bring up between sunset and sunrise on ground where drift-net fishing is actually going on. This Article applies only in the waters and to the vessels mentioned in the Act (*b*).

Precautions to be taken when at anchor.

After coming to an anchor, those on board must show proper skill and seamanship in keeping their vessel from driving and endangering other craft. If a ship parts from her anchor, when with proper care she might have ridden in safety, and drives against another vessel, the collision

(*x*) *The Annot Lyle*, 6 Asp. M. C. 50.

(*y*) *The Neptune the Second*, 1 Dod. 467; *The Secret*, 26 L. T. N. S. 670; *The Earl Spencer*, L R. 4 A. & E. 431; *The Masten*, Brown, Ad. 436.

(*z*) *The Egyptian*, 1 Mar. Law Cas. O. S. 358; 1 Moo. P. C. C. N. S. 373.

(*a*) *The City of Peking*, 14 App. Cas. 40.

(*b*) See further, as to this Act, *supra*, Art. 10.

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will be held to have been caused by the negligence of the former, although after parting from her anchor the collision was inevitable, and all was done that could be done to avoid it. If she drives from her anchor in consequence of her yards not having been sent down, or because she was not tended or made properly snug, she will be held in fault (*c*). Where it is customary and prudent to moor, a vessel neglecting to do so will be held in fault (*d*). The duty to keep an anchor watch has been already referred to (*e*).

If a ship drives from her anchor or parts her chain, and a collision may be avoided by employing a tug which is available, it is negligence not to employ her (*f*).

Where a ship gave another a foul berth in the Downs, and drove against her in a gale of wind while riding at single anchor with forty-five fathoms of chain, it was held that, although the other vessel drove also, she was herself solely to blame (*g*).

Insufficient ground tackle, or riding by a single anchor when there should have been two down, will make a ship liable for a collision so caused (*h*). The ship must be duly tended while at anchor. A ship which goes foul of another through improperly breaking her sheer, will be held in fault (*i*). Where a ship was riding in an open and crowded roadstead in blowing weather, without having sent down her top-gallant and main-royal yards, she was held in fault for a collision caused by her driving (*k*). If a ship in a dock or harbour subject to the Harbours, Docks,

(*c*) *The Excelsior*, L. R. 2 A. & E. 268; *The Christiana*, 7 Moo. P. C. C. 160.

(*d*) *The Gipsey King*, 2 W. Rob. 537.

(*e*) *Supra*, p. 497.

(*f*) *The Arran*, 9 Quebec L. R. 278; and see *The Annot Lyle*, p. 504, *supra*.

(*g*) *The Maggie Armstrong* v. *The Blue Bell*, 2 Mar. Law Cas. O. S. 318, 319.

(*h*) *The Massachusetts*, 1 W. Rob. 371; *The Despatch*, 3 L. T. N. S. 219; *The Volcano*, 2 W. Rob. 337; and see *The William Lindsay*, L. R. 5 P. C. 338; *Allen* v. *Quebec Warehouse Co.*, 12 App. Cas. 101.

(*i*) See *The Peerless*. Lush. 30.

(*k*) *The Christiana*, 7 Moo. P. C. C. 160; and see *The Ruby Queen*, Lush. 266; *The Excelsior*, L. R. 2 A. & E. 268.

Art. 24. and Piers Clauses Act, 1847, is insufficiently moored, after notice from the harbour-master to provide proper fasts, she incurs a penalty of 10*l.* (*l*). It has been held negligence not to increase moorings where the state of the weather required it (*m*).

It was held by the Supreme Court of the United States that a vessel in a gale of wind, with another brought up near her, was in fault for not taking timely precautions for avoiding a collision caused by the other driving on her (*n*). In another American case (*o*), it was held that where a ship at anchor drives and comes into collision with another at anchor, the burden is on the former, alleging inevitable accident, to prove that she had a proper watch on deck, that she discovered the dragging at once, that she took proper measures to prevent it, and that her ground tackle was sufficient.

If a ship is brought up by her own people, or by a compulsory pilot, in an improper berth, so as to endanger other ships, she must be shifted and taken to a proper berth as soon as possible (*p*). Where a ship was compelled to shift her berth in bad weather, owing to her having only one anchor down, and in doing so, although proper precautions were taken, she came into collision, it was held that she was in fault for the collision, because of her original neglect in riding to a single anchor (*q*).

It was held negligence in a ship in threatening weather to ride to a buoy in the River Tyne, with her chain cables unbent and with no anchor ready to let go in case of parting from the buoy. Even in such situations, if the weather is threatening or there is cause for special precautions, an

(*l*) 10 & 11 Vict. c. 27, s. 61.

(*m*) *The John Harley* and *The William Tell*, 2 Mar. Law Cas. O. S. 290; *The Louisiana*, 3 Wall. 164.

(*n*) *The Sapphire*, 11 Wall. 164.

(*o*) *The Dutchess*, 6 Bened. 48.

(*p*) *The Woburn Abbey*, 3 Mar. Law Cas. O. S. 240. As to the duty of the master to shift, although the pilot is on board, if he is no longer in charge, see S. C., p. 234, *supra*.

(*q*) *The Despatch*, 3 L. T. N. S. 219; 14 Moo. P. C. C. 83.

anchor watch must be kept and hands enough must remain on board to tend the ship (*r*).

As a general rule, a ship cannot take up or keep a berth by mooring a buoy at a particular spot. It has been suggested that in particular localities there may be a custom enabling her to do so (*s*). *Sed qu.*

The parting of a cable, the giving way of a buoy to which the ship was moored, and the jamming of the cable on the windlass on letting go the anchor, have been held to be inevitable accidents (*t*).

Making fast to another vessel in harbour, instead of to the shore, has been held to be negligence (*u*).

Where a ship, A., was made fast to another, B., and B., in getting under way, injured A., it was held in America that B. was in fault, although the accident might have been caused partly by the lines by which A. was made fast to B., and which A. had not let go when desired to do so by B. It was held to be negligence in B. to have got under way without seeing that the lines were let go (*x*). And so, in England, a steamer was recently held in fault for injuring, by the movement of her propeller, a barge that was properly moored astern of her (*y*).

Bringing up in a fair-way or improper place.

In harbours and waters where there are local rules, or an established custom, as to the proper anchorage ground, a vessel would be held in fault for a collision caused by her bringing up elsewhere. But if she were compelled to bring up and continue to lie in the fair-way it would be otherwise (*z*). Thus, where a steamer, while going up the Thames on a flood-tide, was compelled by the density of the fog to anchor in the fair-way contrary to the Thames

(*r*) *The Pladda*, 2 P. D. 34; *The Kepler*, 2 P. D. 40. As to the duty to have chains bent, see *The City of Peking*, 14 App. Cas. 40.

(*s*) *The Vivid*, 1 Asp. Mar. Law Cas. 601.

(*t*) See *supra*, p. 10.

(*u*) *The Atlas*, 2 Mar. Law Cas. O. S. Dig. 1480.

(*x*) *The Thornton*, 2 Bened. 429.

(*y*) *The Scotia*, 63 L. T. N. S. 324.

(*z*) *The Kjobenhavn*, 2 Asp. Mar. Law Cas. 213; and see *The Clarita* and *The Clara*, 23 Wall. 1.

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Regulations, and the fog continued such that there was no reasonable opportunity of moving her, she was held free from blame for collision with another steamer coming up after her (*a*). If there is no rule or custom requiring her to bring up out of the fair-way she may anchor there, although directly in the track of ships. Thus, a vessel brought up in the Mersey, directly in the track of the ferry steamers, was held not to be in fault for lying there (*b*). In America it is held that if a vessel does bring up in the track of ferry boats, as she is at liberty to do, she must keep a vigilant look-out and warn the ferry boat of her position (*c*).

The obligation on a ship under way to keep clear of another at anchor, as before stated (*d*), applies although the ship at anchor is in an improper berth. And a vessel brought up in a berth which is improper only in the sense that it is an exposed and dangerous position, does not thereby contribute to a collision caused by another ship negligently driving into her (*e*). But when a barge in the Thames was brought up in an exposed position, and was sunk partly by the swell of a passing steamer, it was held that the negligence in bringing up where she was exposed to the steamer's wash partly caused the loss, and the suit against the steamship was dismissed (*f*).

Slipping to avoid a collision.

It seems that a vessel at anchor is not justified under all circumstances in holding on when by slipping she could avoid a collision. A vessel in Falmouth harbour was driving in a gale of wind towards the breakwater. She could have avoided the breakwater by slipping from her anchor, and getting under way. She did not slip in time,

(*a*) *The Aguadillana*, 6 Asp. Mar. Cas. 390.

(*b*) *The Lancashire*, L. R. 4 A. & E. 198.

(*c*) *The D. S. Gregory*, 6 Blatchf. 528; *The Hudson*, 5 Bened. 206; *The Exchange*, 10 Blatchf. 168; and see *supra*, p. 408.

(*d*) *Supra*, p. 35.

(*e*) *The Despatch*, 3 L. T. N. S. 219; 14 Moo. P. C. C. 83.

(*f*) *The Duke of Cornwall*, 1 Pr. Adm. Dig. p. 201.

went ashore, and did injury to the breakwater. It was held that she was liable for the damage because of her neglect in not slipping in time (*g*). Art. 24.

A vessel getting under way unnecessarily in bad weather with a number of other ships about her would probably be held in fault for a collision which would not have occurred if she had lain fast (*h*). The duty of a heavy ship to exercise more than ordinary caution in getting under way, and of other ships to keep clear of her, has been insisted upon by the American Courts (*i*). Getting under way.

A vessel which was moved from one dock to another by a tug at night was held in fault for a collision with a ship at anchor. It was held that under the particular circumstances she had no right to be under way at all (*k*).

In *The John Fenwick* (*l*), it was held to be the duty of a vessel casting off from her moorings at night to warn an approaching vessel by exhibiting a light.

In an American case it was held that a ferry steamer getting under way when there was another vessel in her way which she ought to have seen, and which it was impossible to clear, was solely in fault for the collision. But it was said that she was not required to wait for the arrival of another boat running on the same ferry, and which was due (*m*).

If a vessel rides by, or makes fast to, or runs foul of, any lightship or buoy, in addition to the obligation to make good all damage, she incurs a penalty of fifty pounds (*n*). Riding by a light-ship.

A vessel in stays—"in irons"—is almost as helpless for Ship in stays;

(*g*) *The Uhla*, 3 Mar. Law Cas. O. S. 148; cf. *The Sapphire*, 11 Wall. 164.

(*h*) *The Carrier Dove*, Br. & Lush. 113; *The Julia M. Hallock*, 1 Sprague, 539; *O'Neil* v. *Sears*, 2 Sprague, 52; *The Thornton*, 2 Bened. 429. The last three are American decisions.

(*i*) *The City of Paris*, 14 Blatchf. 531.

(*k*) *The Borussia*, Swab. Adm. 94.

(*l*) L. R. 3 A. & E. 500.

(*m*) *The Columbus*, Abbott, Adm. 384.

(*n*) Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 414.

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precautions before going about.

the purpose of keeping out of the way of another as a ship at anchor. It is the duty of other ships to keep clear of her. Before going about it is the duty of those on board "to take a due look round beforehand to ascertain that no ship is in the neighbourhood likely to come upon them" (*o*).

If weather permits a ship must have such canvas on her that she can be kept under command and be able to stay (*p*). Upon similar grounds, it would seem to be negligence in a ship to be hove-to unnecessarily in the track of ships, a vessel hove-to being almost helpless, and therefore an obstruction to the navigation (*q*).

It has been held by the Privy Council that a ship should not wear without reason when she can stay; and a ship has been held in fault for a collision with another astern when she wore unnecessarily (*r*). In America a schooner wearing so close ahead of another ship that the latter could not clear her was held in fault (*s*).

Missing stays.

If a vessel misses stays the duty of those on board is to get her under command again as soon as possible (*t*).

Ships working to windward in company.

Where it is the duty of a ship under the Regulations to keep out of the way, she should not stand so close to the other ship, before going about, that if she misses stays a collision must take place. It will be no excuse that she was struck by a squall while in the act of going about (*u*). A full-rigged ship, with the wind aft, meeting a brig and a schooner, both close-hauled on the starboard tack, came into collision with the brig, owing to the sudden and

(*o*) *The Sea Nymph*, Lush. 23; see also *The Ida* and *The Wasa*, 2 Mar. Law. Cas. O. S. 414; *The Allan* and *The Flora*, *ibid.* 386; *The Eleanor* and *The Alma*, *ibid.* 240; *The Bolderaa*, Holt, 205; *The Newburgh* and *The Oscar*, Holt, 231.

(*p*) *The Stirlingshire* and *The Africa*, 2 Mar. Law Cas. O. S. Dig. 672; *The Falkland* and *The Navigator*, Br. & Lush. 204.

(*q*) See *supra*, p. 416.

(*r*) *The Falkland* and *The Navigator*, *ubi supra*.

(*s*) *The Saxonia*, 2 Mar. Law Cas. O. S. 417.

(*t*) *The Kingston-by-Sea*, 3 W. Rob. 152; *The Lake St. Clair* and *The Underwriter*, 3 Asp. Mar. Law Cas. 361.

(*u*) *The Kingston-by-Sea*, *ubi supra*; *The Plato* and *The Perseverance*, Holt, 262.

unexpected going about of the schooner. It was held that she ought not to have stood so close to the other ships as to make a collision inevitable if either of them went about (*x*). So, a sailing ship is in fault if she goes about unnecessarily under the bows of a steamship (*y*). Art. 24.

Where two ships are turning through a narrow channel, one astern of the other and on the same tack, the duty of the sternmost ship is to keep a good look-out, and be ready to go about, if necessary, the instant the other goes about, so as not to risk a collision by standing on while the other is in stays, or has not gathered way on the other tack (*z*). It seems to have been considered by the Privy Council that a ship in stays, or just gathering way on the port tack, should apprise another ship approaching her on the starboard tack of her inability to keep out of the way (*a*). But a sailing ship turning up the Thames was held not to blame for giving no notice to a steamship astern of her intention to go about (*b*).

Rule in America as to beating out tacks.

The rule in America as to ships working to windward in narrow channels is that they must "beat out their tacks," and not go about before the depth of water or exigencies of the navigation require it (*c*). Vessels are expected to know the channel and the point at which other ships will be compelled to go about (*d*). A ship going about before she gets to the edge of the channel, and thereby causing a collision with a passing steamship, was held in fault (*e*). But the rule as to "beating out tacks" does not apply so as to preclude a ship from going about before she reaches

(*x*) *The Mobile*, Swab. Adm. 69; *ibid.* 127.

(*y*) See *The Orwell*, *supra*, p. 477.

(*z*) *The Priscilla*, L. R. 3 A. & E. 125; *The Eclipse* and *The Royal Consort*, Holt, 220.

(*a*) *The Lake St. Clair* and *The Underwriter*, 3 Asp. Mar. Law Cas. 361; and see *The Leonidas*, Stuart's Vice-Ad. Rep., Lower Canada (1858), p. 226.

(*b*) *The Palatine*, 1 Asp. Mar. Law Cas. 468.

(*c*) *Thorp* v. *Hammond*, 12 Wall. 408; *The Empire State*, 1 Bened. 57; *The Bridgeport*, 6 Blatchf. 3; *The Charlotte Raab*, Brown, Adm. 453.

(*d*) *The Nellie D.*, 5 Blatchf. 245.

(*e*) *The Nereus*, 3 Bened. 238.

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the shoal water in order that she may be able to weather a point of land, or other object, on the next tack (*f*). The rule does not appear to have been expressly recognised in any Court in this country. In *The Palatine* (*g*), where there seems to have been room for its application, it was not referred to.

Whether a ship should hold herself in stays for another.

Whether a ship, being in stays, is required to hold herself in stays to allow another vessel to pass, is not clear. Two American cases are contradictory on the point. In *The Empire State* (*h*) the Court said that is the duty of a ship to beat out her tack and come about on the other tack with proper despatch; and that "she is not obliged to remain in the wind for a steamer to pass her." On the other hand, in *The W. C. Redfield* (*i*), it was held that a sailing ship was in fault for not holding herself in stays to allow a tug and her tow to pass clear.

There are decisions of the American Courts to the effect that it cannot be imputed to a ship as a fault that she is sluggish in going about (*k*); and that she is not wrong in fore-reaching or shooting ahead in the wind's eye whilst going about (*l*).

Extra care required in passing over fishing grounds.

Fishing boats have a right to fish on the high sea, and to be fast to their nets, whether their fishing ground is in the track of ships or not. It is the duty of other ships to take greater precautions when passing over a fishing ground, so as to keep clear of the fishing boats, and not make them cast off from their nets (*m*). Bringing up

(*f*) *The Vicksburg*, 7 Blatchf. 216; *The Empire State*, *supra*.

(*g*) 1 Asp. Mar. Law Cas. 468.

(*h*) 1 Bened. 57.

(*i*) 4 Bened. 227; see also *The Arthur Gordon* and *The Independence*, Lush. 270; *The Lake St. Clair* and *The Underwriter*, *ubi supra*.

(*k*) *The Charlotte Raab*, Brown, Adm. 453.

(*l*) 1 Parsons on Shipping (2nd ed.), 578, note.

(*m*) *The Columbus*, 2 Mar. Law Cas. O. S. Dig. 730; *Murphy* v. *Palgrave*, 3 Mar. Law Cas. O. S. 284 (Irish case); *The Margaret* and *The Tuscar*, Holt, 44. But see *The Pacific*, 9 P. D. 124, where a steamship going eight or nine knots at night over trawling ground in the North Sea was held free from blame.

upon certain fishing grounds where drift net fishing is being carried on is forbidden by statute (*n*).

Vessels navigated in an unusual manner or by an improper course do so at their own risk.

Vessels navigating in an unusual manner or by an improper course do so at their own risk. By the bye-laws in force in the Tyne (clause 17), all vessels proceeding to sea are required to keep on the south side of mid-channel; and (clause 20) vessels crossing the river take upon themselves the responsibility of doing so with safety to the passing traffic. A vessel outward bound, coming out of the Tyne dock on the south side of the river, and either intentionally, or under the influence of the tide, crossing over to the north side of the river, came into collision on the north side with two steamships also going down the river. She was held in fault for the collision, as she should not have attempted to cross when there was risk of collision (*o*).

It was held in *The Smyrna* (*p*) that a usual and proper precaution for vessels to take when navigating a winding river against a strong stream, is to keep under the points in the slack of the tide, so as to avoid descending vessels which are swept across the river into the opposite bight by the stream setting off the point. In the Thames, vessels are required to navigate in this manner round certain points (*q*). But, except where local enactments provide otherwise, the rule would seem to be different under the present law of "starboard side" in narrow channels (*r*).

In New York Harbour, where ferry boats are constantly coming out from their slips or docks at right angles to the course of vessels navigating the river, the law requires

(*n*) 46 & 47 Vict. c. 22, *supra*, p. 389.

(*o*) *The Henry Morton*, 2 Asp. Mar. Law Cas. 466. As to the duty of ships to keep on their proper side and in the usual track in rivers, see *supra*, pp. 462—471; and *The Java*, 14 Wall. 189.

(*p*) 2 Mar. Law Cas. O. S. 93.

(*q*) See Appendix, p. 582; *The Margaret*, 9 App. Cas. 873.

(*r*) See Article 21.

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vessels navigating the river to keep in mid-channel, or if they go along the shore to go very slowly (*s*).

Where two steamships were meeting in a narrow channel, one going with and the other against the tide, and it was necessary for one of them to stop, it was held by the Supreme Court in America that the vessel going against the tide should have stopped at once, as she could do so the more readily (*t*). And in *The Talabot* (*u*), it was recently laid down in the Admiralty Division that it is a prudent rule for a steamship navigating a river against the tide to wait before rounding a point until a vessel coming from the opposite direction has passed clear, and a steamer was held in fault for not observing this rule in the river Scheldt.

A vessel warping down the Thames against the flood tide was held in fault for a collision thereby occasioned (*x*); and in America it was held that a vessel with a warp across a river fair-way is bound to slack it to allow another vessel to cross (*y*). A steamship proceeding down the Thames at night against a flood tide is required to exercise the greatest caution (*z*).

Ships dropping up stern foremost.

A steamship is not justified in leaving a wharf in the Thames in a dense fog, and attempting to go up the river at a flood tide. And it may be the prudent course for a vessel navigating the river in a fog with the tide to dredge stern first with her anchor down, so as to be able to bring up in case of emergency (*a*).

A keel in the Goole reach of the river Ouse was held in fault for driving through a narrow part of the fair-way without her anchor on the bottom or near it (*b*).

It would probably be held to be the duty of a ship

(*s*) *The Favorita*, 18 Wall. 598.
(*t*) *The Galatea*, 2 Otto, 439; as to the Thames, see *infra*, p. 582.
(*u*) 89 L. T. 239.
(*x*) *The Hope*, 2 W. Rob. 8.
(*y*) *The Maverick*, 1 Sprague, 23.
(*z*) *The Trident*, 1 Sp. E. & A. 217.
(*a*) *The Aguadillana*, 6 Asp. M. C. 390.
(*b*) *The Ralph Creyke*, 6 Asp. M. C. 19.

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dropping through a fair-way in this manner to exhibit a light over her stern, or in some other way to warn ships that she is approaching them stern foremost (*c*).

Rafts (Canada).

By 43 Vict. c. 29 (Canada), Art. 27, ships are required to keep out of the way of rafts.

Telegraph ships.

The enactment relating to ships engaged in laying or repairing telegraph cables, and the duty of other ships to keep clear of them, has been already referred to (*supra*, p. 341).

Eddy tide.

If a vessel enters an eddy tide, and is thereby prevented from answering her helm, and goes into collision with another ship, it is no excuse that the eddy prevented her from answering her helm (*d*), unless the action of the tide could not have been anticipated or provided against (*e*); and the effect of the tide on other ships must be known and allowed for (*f*).

Risk of smelling the ground.

In the case of a steamship navigating the Goole reach of the river Ouse, where the water was so shallow that there was risk of her smelling the ground and failing to answer her helm, it was held to be her duty, by occasionally stopping her engines, to diminish her way, and so be well under control in case of emergency, and she was held in fault for neglect of this precaution (*g*).

Being under way in thick weather; stress of weather.

If the weather is such that an object cannot be seen in time to avoid it, a vessel has no right to be under way at all. In such weather she should bring up on the first opportunity, and not get under way unless obliged to do so (*h*). In thick and bad weather generally, it is the duty of a vessel under way to exercise more than ordinary care

(*c*) See *The Indian Chief*, 14 P. D. 24.

(*d*) *The La Plata*, Swab. Adm. 220, 223; *The Russia*, 3 Bened. 471; *The City of Peking*, 14 App. Cas. 40.

(*e*) *The Rhondda*, 8 App. Cas. 549.

(*f*) *The Frantz Sigel*, 14 Blatchf. 480.

(*g*) *The Ralph Creyke*, 6 Asp. M. C. 19, *supra*.

(*h*) *The Lancashire*, L. R. 4 A. & E. 198; *The Otter*, L. R. 4 A. & E. 203; *The Aguadillana*, 6 Asp. M. C. 390, *supra*. And see *supra*, p. 250.

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to avoid doing damage to other ships (*i*). "Stress of weather" is an excuse frequently put forward for omitting to exercise ordinary care, but it is one which the Court is very unwilling to accept (*k*).

Standing too close to other craft.

In squally weather it is the duty of a ship not to approach another so near that if a squall strikes her she will go in collision with the other. A vessel will be held in fault if she navigates so close to another that her view is obstructed, and she cannot see a third ship in time to avoid her (*l*); or that she is affected by the wash or suction of the ship ahead, and will not answer her helm (*m*).

A brig on the starboard tack endeavouring to pass a collier driving up the Thames with the tide was caught by a heavy squall which split her foretopsail, and did other damage. The brig came up into the wind and drove against the collier. She was held solely in fault for the collision, because, having reason to expect squalls, she should have given the other vessel a wider berth (*n*).

A barge turning down the Thames on a squally night stood so close to a ship at anchor that, upon her missing stays owing to a squall, she ran into her. The barge was held solely in fault (*o*).

In America, a steamship passing so close to a sloop at anchor that the boom of the latter was driven against her by a sudden gust of wind, was held solely in fault (*p*). And where a steamship at sea sighted a schooner seven miles off, and shaped her course so as to pass within a cable's length of her, it was held by the Circuit Court

(*i*) *The Flint*, 6 Not. of Cas. 271; *The John Harley* and *The William Tell*, 2 Mar. Law Cas. O. S. 290.

(*k*) *The Uhla*, 3 Mar. Law Cas. O. S. 148; *The Flint*, *ubi supra*.

(*l*) *The Zollverein*, Swab. Adm. 96; and see *Mayhew* v. *Boyce*, 1 Stark. 423, *supra*, p. 486.

(*m*) *The General William McCandlass*, 6 Bened. 223, 226.

(*n*) *The Globe*, 6 Not. of Cas. 275.

(*o*) *The Plato* and *The Perseverance*, Holt, 262.

(*p*) *The George Law*, 3 Bened. 396.

that for two ships approaching each other at the rate of eighteen miles an hour such a course was "very far from an exercise of reasonable prudence" (*q*).

Where a ship, which had been ashore, came off unexpectedly and received damage in a collision with another ship which was near her, it was held that the latter was not bound to take such precautions that, at whatever time the ship ashore floated, she would not come against her (*r*).

A ship driving over a sand on which she had been ashore came into collision with another brought up just clear of the sand. It was held that the former was not in fault for the collision, and that it was the result of inevitable accident. The ship that had been ashore could not have let go her anchor whilst driving over the sand without risk to herself, and if she had let go when clear of the sand, the collision would not have been avoided (*s*).

If a ship steers a course to take her alongside another ship to speak her, or for any other purpose, she does so at her own risk (*t*). The Supreme Court of the United States held a steamship solely in fault for a collision with a pilot boat from which she was taking a pilot and which was plainly visible to her, although the pilot boat had no mast-head light and crossed the bows of the steamship (*u*).

In another case (*x*) before the same Court two tugs making for the same vessel in order to get the contract to tow came into collision. It was held that the proper and usual way for tugs to come alongside was to come up on the quarter heading the same way as the vessel, and that the tug which was ahead of the vessel was in fault for not rounding to and coming up under the ship's stern.

(*q*) *The Benefactor*, 14 Blatchf. 254.

(*r*) *The Coxon*, 2 Mar. Law Cas. O. S. Dig. 549.

(*s*) *The Thornley*, 7 Jur. 659; and see *The Buckhurst*, 6 P. D. 152.

(*t*) *The Thames*, 5 C. Rob. 345. See *The Bellerophon*, 3 Asp. Mar. Law Cas. 58.

(*u*) *The City of Washington*, 2 Otto, 31.

(*x*) *Sturgis* v. *Clough*, 21 How. 451.

Art. 24.

A steam-tug unnecessarily entering a narrow cut leading to the Bute Docks, after a signal had been made by the harbour authority for sailing ships to enter, was held in fault for a collision (*y*).

The Supreme Court in America has held that a vessel undertaking to pass another in a narrow channel (*z*), or navigating such a channel in weather that makes it dangerous (*a*), does so at her own risk. Where a ship was ashore in such a place, it was held that, whether she went ashore by her own negligence or not, another vessel attempting to pass her was in fault for running into her (*b*).

Where the leading vessel of two steamers proceeding down a river with the stream, and bound to the same place on its banks, rounded to at a proper place to land her passengers, and the following vessel, instead of stopping and rounding to under her stern, attempted to turn ahead of her and a collision occurred, the following vessel was (in Canada) held solely in fault (*c*).

Vessel, owing to peculiar construction, or otherwise, dangerous to others.

If a vessel is of a construction or is in a condition which is specially dangerous to other vessels, it is her duty to warn approaching vessels of the fact. Where a ship of war carried on her stem under water a projecting ram or spur, it was said that under ordinary circumstances it would have been her duty to apprise a vessel coming alongside of the risk she ran in approaching her (*d*).

Special precautions are required of a ship in a disabled condition, of a ship hove-to and unable to keep clear of other ships, as well as of other ships approaching the disabled vessel (*e*); of a tug with a ship in tow, and of both

(*y*) *The Effort*, 5 Not. of Cas. 279.
(*z*) *The Merrimac*, 14 Wall. 199.
(*a*) *The Mohler*, 21 Wall. 231.
(*b*) *The Ellen S. Terry*, 7 Bened. 401.
(*c*) *The Crescent* v. *The Rowland Hill*, Stuart's Rep. (1858) (Vice-Adm. Ct., Lower Canada), 289.
(*d*) *The Bellerophon*, 3 Asp. Mar. Law Cas. 58; and see *The Batavier*, 1 Sp. E. & A. 378.
(*e*) *The Arthur Gordon* and *The Independence*, Lush. 270; and see *supra*, pp. 9, 185.

the tug and her tow, so as not to damage each other when taking the tow-line on board, and during the performance of the towage (*f*). It is the duty of a ship unable to keep out of the way in compliance with the Regulations to hail the other ship, and of the latter herself to keep out of the way (*g*).

Coming out of dock.

Where a vessel is coming out of dock or harbour, or executing a manœuvre in the course of which an alteration of her helm is necessary, another ship approaching her is justified in acting upon the assumption that the necessary measures will be taken by the former vessel with proper skill and despatch, and that her course will be that which is obviously intended (*h*). A schooner coming out of St. George's Dock in the Mersey, the tide being flood and the wind southerly, saw a tug with a ship in tow coming down the river towards her. She put her helm hard a-port and scandalized her mainsail in order to get her head to point down the river. Owing to the flood tide catching her under the starboard bow she did not answer her helm readily, and came into collision with the tug. If she had run up her outer jib, which she did not do, she would have answered her helm better, and would have kept clear of the tug. The latter had kept her course in the expectation that the schooner would set her jib and straighten herself in the river, as she was intending to do. It was held that the schooner was solely in fault for the collision, and that the tug did right in acting upon the assumption that the schooner's jib would have been run up, and that she would have straightened herself and kept on the tug's starboard side (*i*).

Dumb barges.

Dumb barges or lighters that drive with the tide have little or no control over their own movements, and cannot

(*f*) See *supra*, pp. 199, *seq.*

(*g*) *The Lake St. Clair* and *The Underwriter*, 3 Asp. Mar. Law Cas. 361.

(*h*) *The Ulster*, 1 Mar. Law Cas. O. S. 234; *The Franconia*, 2 P. D. 8.

(*i*) *The Ulster*, 1 Mar. Law Cas. O. S. 234.

Art. 24.

keep out of the way of other craft. In the absence of any rule or custom, they are not required to navigate in the shallow water of a river, so as to leave the deep channel open to vessels of greater draught (*k*). In the Thames, where they do not carry anchors, they are justified in going on after being overtaken by a fog, until they come in contact with something to which they can make fast (*l*). It is, therefore, the duty of other vessels, and particularly of steamships, to keep out of their way. In order to do this, they must know, in each case, the set of the tide and probable course of the lighter (*m*).

Speed in narrow channels.

In a river or narrow channel, steamships must go at such a rate of speed as will not raise a swell to endanger barges and other craft. In the Thames, and some other rivers, there are bye-laws to this effect. Whatever the rate of speed required by local bye-laws, if a ship, though not exceeding that rate, endangers other craft, she will be held in fault (*n*). But for a vessel sunk by the swell of a passing vessel to recover against the other ship, it must be clearly proved that the sunken craft was not mismanaged or overladen (*o*). In the Suez Canal, five and a-half knots; in the Tees, six miles an hour; and in certain parts of the Thames, seven statute miles over the ground, are the highest rates of speed allowed by the local rules (*p*). Where a rate of speed is specified by a local rule of navigation or Act of Parliament, the rate over the ground as distinguished from the rate through the water, is *primâ facie* intended (*q*).

(*k*) *The Ralph Creyke*, 6 Asp. M. C. 19.

(*l*) *The Rose of England*, 6 Asp. M. C. 304.

(*m*) *The Swallow*, 3 Asp. Mar. Law Cas. 371; *The Owen Wallis*, L. R. 4 A. & E. 175. For American decisions to the same effect, see *Fretz* v. *Bull*, 12 How. 466; *Pearce* v. *Page*, 24 How. 228; *Butterfield* v. *Boyd*, 4 Blatchf. 356.

(*n*) *The Batavier*, 1 Sp. E. & A. 378; 9 Moo. P. C. C. 286; see *The Duke of Cornwall*, 1 Pr. Adm. Dig. 135; *Smith* v. *Dobson*, 3 M. & G. 59.

(*o*) *Luxford* v. *Large*, 5 C. & P. 421. The rule of equal division of loss only applies in case of *collision*; 36 & 37 Vict. c. 66, s. 25, sub-s. 9; but see p. 136, *supra*.

(*p*) See Appendix for these rules.

(*q*) *The Alston*, 8 P. D. 5.

Art. 24.

Special precautions required at launch.

Where a vessel is being launched, the law casts upon the persons in charge of the launch the obligation of conducting it with the utmost precaution, and of giving such notice as is reasonable and sufficient to prevent injury to passing vessels. In *The Andalusian* (*r*), although notice of the intended launch was posted up in a conspicuous place, flags were flying on the ship to be launched, and two tugs with boats were employed to warn passing vessels, a vessel that was passing was not warned, and those in charge of the launch were held responsible for a collision with her.

In *The Blenheim* (*s*), Dr. Lushington said, with regard to the duty of those in charge of the launch:—"Such reasonable notice of a launch shall be given as shall prevent danger or reasonable chance of danger to other vessels navigating in the river. That is the first great principle and rule in these cases. As all other vessels have a right to navigate in a river, no person shall interfere with that navigation without such reasonable notice of a launch as may prevent the chance of an injury to them. What is reasonable notice depends on local circumstances, the breadth of the river, the number of vessels passing, and other circumstances of that kind. It must be not a mere general notice of a launch on a particular day; the notice must so specify the time of the launch that vessels navigating up and down the river may not be damaged or incur danger."

In *The Andalusian* (*t*) the duty of those in charge of a launch was thus stated: "The law throws upon those who launch a vessel the obligation of doing so with the utmost precaution, and giving such a notice as is reasonable and sufficient to prevent any injury happening from the launch; and, moreover, the burden of showing that every reasonable precaution has been taken, and every reason-

(*r*) 2 P. D. 231; see also *The Vianna*, Swab. 405.

(*s*) 4 Not. of Cas. 393.

(*t*) 2 P. D. 231.

Art. 24.

able notice given, lies upon her and those navigating the launch." This statement of the law was cited and acted upon by Butt, J., in *The George Roper* (*u*). In the same case the learned judge pointed out that "when you set a vessel of large size, without engines and without a helm, and with only a tug to manage her, off the ways at a speed of seven knots across the fair-way of the river Mersey, the utmost precautions are only reasonable." He held that the people in charge of the launch were in fault for not taking every possible step to assure themselves that no vessel was approaching the ways before the launch was started. He also expressed his opinion that in the Mersey the tug or tugs attending a launch should be decorated with flags in the usual way when a launch is about to take place (*x*).

In *The Cachapool* (*y*) it was held that a vessel at anchor in the way of a launch was in fault for a collision with the launch. Notice had been given her at six o'clock of the intended launch, which took place at half-past ten; and shortly before that hour a tug had been sent by those in charge of the launch to endeavour to get the ship at anchor to allow the tug to tow her out of the way.

In *The Glengarry* (*z*) it was held that all proper precautions were taken, and that the vessel under way (a tug with barges in tow) was solely in fault for steaming across the path of *The Glengarry* at the moment she was being started.

Even after proper notice of a launch has been given, it must not take place so long as other vessels are in the way. If it is customary for the harbour-master to superintend or be present, it should not take place in his absence (*a*).

(*u*) 8 P. D. 119. Similar language was used by Sir R. Phillimore in *The Glengarry*, 2 P. D. 235.

(*x*) See also *The Glengarry*, 2 P. D. 235, on this point.

(*y*) 7 P. D. 217.

(*z*) 2 P. D. 235.

(*a*) *The United States*, 2 Mar. Law Cas. O. S. 166.

Art. 24.

Small craft not required by law to keep out of the way of heavy ships.

There is no rule in law requiring small vessels to keep out of the way of larger ones, though it may be much easier for them to do so than for the larger ship to take the steps required by the Regulations. A large ship going at a slow speed in a narrow channel may be unable to alter her course rapidly, but, so far as she can do so, she must comply with the Regulations. In such a case it will be the duty of the smaller vessel to take such precautions as are rendered necessary by the comparatively helpless condition of the larger ship (*b*).

Reservation of Rules for Harbours and Inland Navigation.

ARTICLE 25 (*c*).

Art. 25.

Local rules not affected by the general rules.

Nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbour, river, or inland navigation.

This Article is identical with Art. 25 of the Regulations of 1880. The Regulations of 1863 contain no corresponding Article. It does not appear to make any alteration in the law as regards waters within the Queen's dominions to which the Merchant Shipping Acts apply, the effect of local rules in such waters being saved by 25 & 26 Vict. c. 63, s. 31.

Local rules have not, in all cases, been recognized by the Courts as of equally binding effect with the general Regulations; but there is no doubt that an infringement of a local rule made by a competent authority and applicable to the case will, unless excused by special circumstances, be held to be negligence contributing to a collision (*d*). A

(*b*) See *The La Plata*, Swab. Adm. 220; on app., *ibid.* 298; and see *The Arthur Gordon* and *The Independence*, Lush. 270.

(*c*) Corresponding to Art. 30 of the Washington Regulations.

(*d*) See *The Margaret*, 9 P. D. 47; 9 App. Cas. 873; *The Yourri* and *The Spearman*, 10 App. Cas. 276.

Art. 25.

bye-law made under a local Act required ships coming into the Tyne to keep on the north side of the river. *The Raithwaite Hall*, coming in from the sea in a thick fog, was in collision, on the south side of the river, with a vessel bound out. In the absence of proof of negligence on the part of the latter, *The Raithwaite Hall* was held to be in fault for the collision (*e*). In this case Sir R. Phillimore said, with regard to the effect of local rules: "There should, however, be no misunderstanding as to the effect of these and similar bye-laws governing the navigation of a river. It cannot be held that, because they or any of them are disobeyed, the vessel disobeying them is therefore to be held to blame. They are only evidence of what it is the duty of a vessel to do under the circumstances named in the particular bye-law. As such evidence, however, they are an important element in every case that comes within their provisions; and if it should appear that by the breach of one of them a ship has occasioned or contributed to a collision, the existence of such a bye-law would afford the very strongest reason for holding that a ship had been guilty of a breach of duty and was to blame for the collision" (*f*).

An infringement of a local rule made under 25 & 26 Vict. c. 63, s. 32, or by or under an Act which incorporates 35 & 36 Vict. c. 85, s. 17, will cause the ship to be held in fault without reference to the question of actual negligence. See *supra*, pp. 58, *seq.*

Effect of local rules in foreign waters.

The words of Article 25 are very wide, and appear to negative the operation of the general Regulations in all

(*e*) *The Raithwaite Hall*, 2 Asp. Mar. Law Cas. 210.

(*f*) As to the obligation to obey local rules, the recognition of them by an Admiralty Court, and proof of them, see *The Henry Morton*, 2 Asp. Mar. Law Cas. 466; *The Iron Duke*, Holt, 227; *The Peerless*, Lush. 30; 13 Moo. P. C. C. 484; *The Smyrna*, 2 Mar. Law Cas. O. S. 93. As to the effect of a breach of a local statutory rule or duty, see *The United Service*, 8 P. D. 56; *Atkinson* v. *Newcastle and Gateshead Waterworks Co.*, 2 Ex. D. 441. Ignorance of a local rule is no excuse for disobeying it: *The River Derwent*, 6 Asp. M. C. 467, *per* Lord Esher, M. R.

waters, at home or abroad, where they conflict with rules "duly made by local authority." But it seems to have been held that local rules as to ships' lights in foreign waters were not binding on British ships (*g*).

Local rules. Local rules are in force in the Thames, Mersey, Arron river, Clyde, Humber, Tees, Trent, Tyne, and at Belfast, Dublin, and Cork. In the case of the Thames and some other waters, the local rules are nearly identical with the general Regulations. Some of these rules will be found in the Appendix, *infra*.

It has been held by a Scotch Court that in the river Clyde, where local rules of navigation are in force, the general Regulations nevertheless applied; and a steamship that had infringed the general Regulations was held in fault (*h*).

Vessels navigating the sea channels at the mouth of the Mersey are required to keep on the starboard side of the channel; and vessels at anchor in those channels are required to exhibit a second riding light at the mizen-peak (*i*).

By 25 & 26 Vict. c. 63, s. 32, her Majesty has power to make regulations for rivers and inland waters where they cannot be made under any local Act. Under this power rules have been made for the Mersey (*k*) and for some of the Lancashire inland navigations (*l*).

By 10 & 11 Vict. c. 27, dock and harbour authorities have power to make such regulations; and by 28 & 29 Vict. c. 125, in dockyard ports the Queen's harbour-master has a similar power. Under the last-mentioned Act Regulations have been made for Queenstown, Deptford,

(*g*) *The William Hutt*, cited in Lowndes on Collision, 187; *The Michelimo* and *The Dacca*, P. C. May, 1877.

(*h*) *Little* v. *Burns*, *The Owl* and *The Ariadne*, 9 Sess. Ca. 4th Ser. 118.

(*i*) 37 & 38 Vict. c. 52. See Appendix.

(*k*) See Order in Council of 27th June, 1866.

(*l*) See two Orders in Council of 18th May, 1870.

Art. 25.

Chatham and Sheerness, Woolwich, Portsmouth, Plymouth, Pembroke, and Portland (*m*).

There are special rules for the navigation of the Danube (*n*), and for the Suez Canal (*o*).

There are in force in the Bosphorus rules relating to the navigation of steamships. These rules are issued in the Turkish language, and it is not clear that they are intended to apply to any but Turkish ships. One of them requires steamships in the Bosphorus to navigate in mid-channel.

Local rules conflicting with the general Regulations.

Difficulties arise in some cases where the local rules are not consistent with the general Regulations; but it appears that in the waters in which they are in force the local rules must be obeyed without regard to the general Regulations, if the latter conflict with them. At a time when there was no bye-law in force in the Thames requiring sailing ships to carry lights, a Trinity sailing ballast lighter was run down in the river when carrying no lights. It was held that, not being a sea-going vessel, she was not required by the general Regulations to carry lights, and that she was not required to carry them under the local rules, there being no rule on the subject (*p*). Sir R. Phillimore expressed an opinion that the power of the local authority (the Thames Conservators) did not enable them to make bye-laws for sea-going ships, and their powers applied to river craft only. It seems, however, that the existing Thames bye-laws are binding on all ships in the Thames.

(*m*) See Orders in Council of 29th Feb. 1868, 29th June, 1878, 19th May, 1885, 29th June, 1888, 15th Aug. 1890, and 22nd Nov. 1890.

(*n*) As to former rules for the Danube, see *The Smyrna*, 2 Mar. Law Cas. O. S. 93; Orders in Council of 6th January, 1862; 21st March, 1863; 6th April, 1866. The Danube rules now (1890) in force appear to be those of 30th May, 1884, replacing those of 19th May, 1881.

(*o*) The substance of these rules will be found in the Appendix below.

(*p*) *The C. S. Butler*, L. R. 4 A. & E. 238. In America there are in force special rules as to steamships' lights, some of which appear to be inconsistent with the Regulations.

Art. 25.

It appears that where the local rules do not conflict with the general rules, the latter are supplementary to the local rules. Local rules, though not made by any competent authority, may, by long usage and well-recognized practice, establish a custom, the infringement of which will be negligence. The obligation to obey such a custom of the river was upheld by the Privy Council in *The Fyenoord*. That case was decided under sect. 297 of 17 & 18 Vict. c. 104, by which it was enacted, in effect, that vessels going up the Thames should keep on the north or starboard side. *The Fyenoord*, a foreign ship, was navigating on the south side, and came into collision with a vessel bound down. It was held that, even if the statute was not binding on foreign ships, a custom had emanated from the statute that ships should navigate in accordance with it, and that *The Fyenoord* was to blame for transgressing the custom (*q*).

The question may arise whether in rivers, such as the Thames, where there are in force local rules which contain no "starboard side" or corresponding rule, vessels are required by Art. 21 of the general Regulations to navigate on the starboard side. There is no doubt that the intention of those who framed the Thames Rules was that vessels should be free to navigate on either side of the river, and it would probably be held that such is the law; but the question is not free from doubt (*r*).

Special Lights for Squadrons and Convoys.

Article 26 (*s*).

Art. 26. Special lights

Nothing in these rules shall interfere with the operation of any special rules made by the Government of any nation

(*q*) *The Fyenoord*, Swab. Adm. 374; see also, as to local custom, *The Smyrna*, 2 Mar. Law Cas. O. S. 93; 2 Moo. P. C. C. N. S. 447.

(*r*) See above, p. 465.

(*s*) Corresponding to Art. 13 of the Washington Regulations.

Art. 26. for squadrons and convoys.

with respect to additional station and signal lights for two or more ships of war, or for ships sailing under convoy.

This Article corresponds with Art. 26 of the Regulations of 1880. The Regulations of 1863 contained no similar proviso. Her Majesty's ships are not bound by the Regulations issued under the powers of the Merchant Shipping Acts (*t*); but Regulations exactly in accordance with them being issued by the Lords of the Admiralty, the question of negligence in case of a collision between two of her Majesty's ships, or between one of them and a merchant ship, is substantially the same as in the case of a collision between merchant ships (*u*).

In the case of a collision between a foreign man-of-war or public ship and a merchant vessel, the foreign vessel, if she submits to the jurisdiction of the courts of this country, would be bound by the Regulations (*x*).

Article 27 (*y*).

Art. 27. Distress signals.

When a ship is in distress, and requires assistance from other ships, or from the shore, the following shall be the signals to be used or displayed by her, either together or separately, that is to say:—

In the daytime—

1. *A gun fired at intervals of about a minute;*
2. *The International Code signal of distress indicated by N. C.;*
3. *The distant signal, consisting of a square flag, having either above or below it a ball, or anything resembling a ball.*

(*t*) See 17 & 18 Vict. c. 104, s. 4.

(*u*) *H.M.S. Topaze*, 2 Mar. Law Cas. O. S. 38; *H.M.S. Supply*, *ibid.* 262. And see Art. 1001 of the Queen's Regulations for the Navy, of 1879.

(*x*) See *The Lord Byron*, cited Maude and Pollock on Shipping, 4th ed. 607, note (*k*); *The Newbattle*, 33 W. R. 318.

(*y*) Corresponding to Art. 31 of the Washington Regulations.

Art. 27.

At night—

1. *A gun fired at intervals of about a minute;*
2. *Flames on the ship (as from a burning tar barrel, oil barrel, &c.);*
3. *Rockets or shells, throwing stars of any colour or description, fired one at a time, at short intervals.*

The Regulations of 1880 contain no corresponding Article.

The Article appears to have been inserted in the Regulations by mistake. Her Majesty has no power under the Acts recited in the Order in Council of the 11th August, 1884, to make regulations for vessels in distress requiring assistance. The signals specified in Art. 27 are, however, authorized by 36 & 37 Vict. c. 85, s. 18, as regards British ships, and all ships within British jurisdiction.

APPENDIX.

25 & 26 Vict. c. 63, ss. 25—32, and ss. 57, 58, 60.

Enactment of Regulations concerning lights, fog-signals, and sailing rules, in Schedule, Table (C).

§ 25. On and after the 1st day of June, 1863, or such later day as may be fixed for the purpose by Order in Council, the Regulations contained in the Table marked (C) in the schedule hereto shall come into operation and be of the same force as if they were enacted in the body of this Act; but her Majesty may from time to time on the joint recommendation of the Admiralty and the Board of Trade, by Order in Council, annul or modify any of the said Regulations, or make new Regulations in addition thereto or in substitution therefor; and any alterations in or additions to such Regulations made in manner aforesaid shall be of the same force as the Regulations in the said schedule.

Regulations to be published.

§ 26. The Board of Trade shall cause the said Regulations, and any alterations therein or additions thereto hereafter to be made to be printed, and shall furnish a copy thereof to any owner or master of a ship who applies for the same; and production of the Gazette in which any Order in Council containing such Regulations, or any alterations therein, or additions thereto is published, or of a copy of such Regulations, alterations, or additions signed, or purporting to be signed by one of the Secretaries or Assistant-Secretaries of the Board of Trade, or sealed, or purporting to be sealed with the seal of the Board of Trade, shall be sufficient evidence of the due making and purport of such Regulations, alterations, or additions.

Owners and masters bound to obey them.

§ 27. All owners and masters of ships shall be bound to take notice of all such regulations as aforesaid, and shall, so long as the same continue in force, be bound to obey them, and to carry and exhibit no other lights, and to use no other fog signals than such as are required by the said Regulations; and in case of wilful default the master or the owner of the ship, if it appear that he was in such fault, shall, for each occasion upon which such Regulations are infringed be deemed to be guilty of a misdemeanour.

Breaches of Regulations to imply wilful default of person in charge.

§ 28. In case any damage to person or property arises from the non-observance by any ship of any Regulation made by or in pursuance of this Act, such damage shall be deemed to have been occasioned by the wilful default of the person in charge of the deck of such ship at the time, unless it is shown to the satisfaction of the Court that the circumstances of the case made a departure from the Regulations necessary.

If collision ensues from breach of the Regulations, ship to be deemed in fault.

§ 29. *If in any case of collision it appears to the Court before which the case is tried, that such collision was occasioned by the non-observance of any Regulation made by or in pursuance of this Act, the ship by which such Regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the Court, that the circumstances of the case made a departure from the Regulation necessary.* (Repealed 36 & 37 Vict. c. 85, s. 33; the same Act containing (s. 17) a corresponding proviso. See *infra*, p. 536.)

Inspection for enforcing Regulations.

§ 30. The following steps may be taken to enforce compliance with the said Regulations; that is to say,

(1.) The surveyors appointed under the third part of the Principal Act (*a*), or such other persons as the Board of Trade may appoint for the purpose, may inspect any ships for the purpose of seeing that such ships are properly provided with lights and with the means of making fog signals in pursuance of the said Regulations, and shall for that purpose have the powers given to inspectors by the 14th section of the Principal Act.

(2.) If any such surveyor or person finds that any ship is not so provided, he shall give to the master or owner notice in writing, pointing out the deficiency, and also what is, in his opinion, requisite in order to remedy the same.

(3.) Every notice so given shall be communicated in such manner as the Board of Trade may direct to the collector or collectors of customs at any port or ports from which such ship may seek to clear, or at which her *transire* is to be obtained; and no collector to whom such communication is made shall clear such ship outwards, or grant her a *transire*, or allow her to proceed to sea without a certificate under the hand of one of the said surveyors, or other persons appointed by the Board of Trade as aforesaid, to the effect that the said ship is properly provided with lights, and with the means of making fog signals in pursuance of the said Regulations (*b*).

Rules for harbours

§ 31. Any rules concerning the lights or signals to be carried by vessels navigating the waters of any harbour, river, or

(*a*) 17 & 18 Vict. c. 104.

(*b*) The M. S. Act, 1876 (39 & 40 Vict. c. 80), s. 14, gives an appeal to a Court of Survey against a surveyor's refusal of a certificate.

other inland navigation, or concerning the steps for avoiding collision to be taken by such vessels, which have been or are hereafter made by or under the authority of any Local Act shall continue and be of full force and effect, notwithstanding anything in this Act or in the Schedule thereto contained.

under local Acts to continue in force.

§ 32. In case of any harbour, river, or other inland navigation, for which such Acts are not and cannot be made under the authority of any Local Act, it shall be lawful for Her Majesty in Council, upon application from the harbour, trust, or body corporate, if any, owning or exercising jurisdiction upon the waters of such harbour, river, or inland navigation, or, if there is no such harbour, trust, or body corporate, upon application from persons interested in the navigation of such waters, to make rules concerning the lights or signals to be carried, and concerning the steps for avoiding collision to be taken by vessels navigating such waters, and such Rules when so made shall, so far as regards vessels navigating such waters, have the same effect as if they were Regulations contained in Table (C) in the Schedule to this Act, notwithstanding anything in this Act or in the Schedule thereto contained.

In harbours and rivers where no such rules exist they may be made.

§ 33. *In every case of collision between two ships it shall be the duty of the person in charge of each ship, if and so far as he can do so without danger to his own ship and crew, to render to the other ship, her master, crew, and passengers (if any) such assistance as may be practicable, and as may be necessary in order to save them from any danger caused by the collision.*

In case of collision one ship shall assist the other.

In case he fails so to do, and no reasonable excuse for such failure is shown, the collision shall, in absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default; and such failure shall also, if proved upon any investigation held under the third or eighth part of the principal Act, be deemed to be an act of misconduct or a default for which his certificate (if any) may be cancelled or suspended. (Repealed by 36 & 37 Vict. c. 85, s. 33. The same Act contains (s. 16) a similar provision; see *infra*, p. 536.)

* * * * *

§ 57. Whenever foreign ships are within British jurisdiction, the Regulations for preventing collision contained in Table (C) in the Schedule to this Act, or such other Regulations for preventing collision as are for the time being in force under this Act, and all provisions of this Act relating to such Regulations, or otherwise relating to collisions, shall apply to such foreign ships; and in any cases arising in any British Court of Justice concerning matters happening within British jurisdiction, foreign ships shall, so far as regards such

Foreign ship in British jurisdiction to be subject to Regulations in Table (C) in Schedule.

Regulations and provisions, be treated as if they were British ships.

Regulations where adopted by a foreign country, may be applied to its ships on the high seas.

§ 58. Whenever it is made to appear to Her Majesty that the Government of any foreign country is willing that the Regulations for preventing collision contained in Table (C) in the Schedule to this Act, or such other Regulations for preventing collision as are for the time being in force under this Act, or any of the said Regulations, or any provisions of this Act relating to collisions, should apply to the ships of such country when beyond the limits of British jurisdiction, Her Majesty may, by Order in Council, direct that such Regulations, and all provisions of this Act which relate to such Regulations, and all such other provisions as aforesaid, shall apply to the ships of the said foreign country, whether within British jurisdiction or not.

* * * * *

Ships of foreign countries adopting the rules for measurement of tonnage need not be re-measured in this country.

§ 60. Whenever it is made to appear to Her Majesty that the rules concerning the measurement of tonnage of merchant ships for the time being in force under the principal Act (*c*) have been adopted by the Government of any foreign country, and are in force in that country, it shall be lawful for Her Majesty, by Order in Council, to direct that the ships of such foreign country shall be deemed to be of the tonnage denoted in their certificates of registry or other national papers; and thereupon it shall no longer be necessary for such ships to be re-measured in any port or place in Her Majesty's dominions, but such ships shall be deemed to be of the tonnage denoted in the certificates of registry or other papers, in the same manner, to the same extent, and for the same purposes in, to, and for which the tonnage denoted in the certificates of registry of British ships is deemed to be the tonnage of such ships.

* * * * *

The Schedule referred to in this Act—Table (C).

The Regulations contained in this Schedule, which, with the exception of some verbal errors, were identical with those of January, 1863, were repealed by an Order in Council of the 9th January, 1863, and by the same Order in Council other Regulations were enacted in their place. The Regulations of 1863 remained in force until the 1st of September, 1880, on which day the Regulations enacted by Order in Council of the 14th of August, 1879, came into force. By the same Order the Regulations of 1863 are repealed as from that day. The Regulations of 1884 came into force on the 1st of September, 1884 (as to British ships), and those of 1880 were repealed as from that date: see Orders in Council, 11th August, 1884, London Gazette, 19th and 22nd August, 1884.

(*c*) 17 & 18 Vict. c. 104.

The Legislation as to Collisions prior to 25 & 26 Vict. c. 63, was as follows:—

In 1840 the London Trinity House issued the following rule (dated 30th October, 1840), which, though not having the force of law, was recognized as embodying the custom of seamen (see 1 W. Rob. 488 for the rule):—

Whereas the recognized rule for sailing vessels is that those having the wind fair shall give way to those on a wind; that when both are going by the wind the vessel on the starboard tack shall keep her wind, and the one on the larboard tack bear up, thereby passing each other on the larboard hand; that when both vessels have the wind large or abeam and meet, they shall pass each other in the same way on the larboard hand; to effect which two last-mentioned objects, the helm must be put to port; and as steam vessels may be considered in the light of vessels navigating with a fair wind, and should give way to sailing vessels on a wind on either side, it becomes only necessary to provide a rule for their observance when meeting other steamers or sailing vessels going large; when steam vessels on different courses must unavoidably or necessarily cross so near that by continuing their respective courses there would be a risk of coming in collision, each vessel shall put her helm to port so as always to pass on the larboard side of each other.

This was followed by 9 & 10 Vict. c. 100, s. 9:

Every steam vessel, when meeting or passing any other steam vessel, shall pass as far as may be safe on the port side of such other vessel, and every steam vessel navigating any river or narrow channel shall keep, as far as practicable, to that side of the fairway or mid-channel of such river or channel which lies on the starboard side of such vessel, due regard being had to the tide, and to the position of each vessel in such tide; and the master or other person having the charge of any such steam vessel and neglecting to observe these Regulations, or either of them, shall for each and every instance of neglect forfeit and pay a sum not exceeding fifty pounds.

This was followed by 14 & 15 Vict. c. 79, s. 27:

Whenever any vessel proceeding in one direction meets a vessel proceeding in another direction, and the master or other person having charge of either such vessel perceives that if both vessels continue their respective courses they will pass so near as to involve any risk of a collision, he shall put the helm of his vessel to port, so as to pass on the port side of the other vessel, due regard being had to the tide and to the position of each vessel with respect to the dangers of the channel, and, as regards sailing vessels, to the keeping of each vessel under command; and the master of any steam vessel navigating any river or narrow channel shall keep as far as is practicable to that side of the fairway or mid-channel thereof which lies on the starboard side of such vessel; and if the master or other person having charge of any steam vessel neglect to observe these Regulations or either of them, he shall for every such offence be liable to a penalty not exceeding fifty pounds.

Then came 17 & 18 Vict. c. 104, ss. 296, 297:

§ 296. Whenever any ship, whether a steam or sailing ship proceeding in one direction, meets another ship, whether a steam or sailing ship, proceeding in another direction, so that if both ships were to continue

their respective courses they would pass so near as to involve any risk of a collision, the helms of both ships shall be put to port so as to pass on the port side of each other, and this rule shall be obeyed by all steamships and by all sailing ships, whether on the port or starboard tack, and whether close-hauled or not, unless the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger, and subject also to proviso that due regard shall be had to the dangers of navigation, and, as regards sailing ships on the starboard tack close-hauled, to the keeping of ships under command.

§ 297. Every steamship when navigating any narrow channel shall, whenever it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such steamship.

All these enactments have been repealed, and the only Act upon the subject now in force is 25 & 26 Vict. c. 63, above stated.

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36 & 37 Vict. c. 85.

Duties of master in case of collision.

§ 16. In every case of collision between two vessels it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without danger to his own vessel, crew, and passengers (if any), to stay by the other vessel until he has ascertained that she has no need of further assistance, and to render to the other vessel, her master, crew, and passengers (if any) such assistance as may be practicable and as may be necessary in order to save them from any danger caused by the collision; and also to give to the master or person in charge of the other vessel the name of his own vessel and of her port of registry, or of the port or place to which she belongs, and also the names of the ports and places from which and to which she is bound.

If he fails to do so, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default.

Every master or person in charge of a British vessel who fails without reasonable cause to render such assistance or give such assistance as aforesaid shall be deemed guilty of a misdemeanour, and if he is a certificated officer, an inquiry into his conduct may be held, and his certificate may be cancelled or suspended.

Liability for infringement of Regulations in case of collision.

§ 17. If in any case of collision it is proved to the Court before which the case is tried that any of the Regulations for preventing collision contained in or made under the Merchant Shipping Acts, 1854 to 1873, has been infringed, the ship by which such Regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the Court that the circumstances of the case made departure from the Regulation necessary.

THE REGULATIONS FOR PREVENTING COLLISIONS AT SEA (*x*).

Art. 1. In the following rules every steamship which is under sail and not under steam is to be considered a sailing ship; and every steamship which is under steam, whether under sail or not, is to be considered a ship under steam.

Rules concerning Lights.

Art. 2. The lights mentioned in the following articles, numbered 3, 4, 5, 6, 7, 8, 9, 10, and 11, and no others, shall be carried in all weathers, from sunset to sunrise.

Art. 3. A sea-going steamship when under way shall carry—

(a.) On, or in front of, the foremast, at a height above the hull of not less than 20 feet, and if the breadth of the ship exceeds 20 feet then at a height above the hull not less than such breadth, a bright white light, so constructed as to show an uniform and unbroken light over an arc of the horizon of 20 points of the compass, so fixed as to throw the light 10 points on each side of the ship, viz., from right ahead to 2 points abaft the beam on either side; and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles:

(b.) On the starboard side, a green light, so constructed as to show an uniform and unbroken light over an arc of the horizon of 10 points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.

(c.) On the port side, a red light, so constructed as to show an uniform and unbroken light over an arc of the horizon of 10 points of the compass, so fixed as to throw the light from right ahead to 2 points abaft the beam on the port side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.

(*x*) Of 1884.

(d.) The said green and red side lights shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

Art. 4. A steamship, when towing another ship, shall, in addition to her side lights, carry two bright white lights in a vertical line one over the other, not less than three feet apart, so as to distinguish her from other steamships. Each of these lights shall be of the same construction and character, and shall be carried in the same position as the white light which other steamships are required to carry.

Art. 5. (a.) A ship, whether a steamship or a sailing ship, which from any accident is not under command, shall at night carry, in the same position as the white light which steamships are required to carry, and, if a steamship, in place of that light, three red lights in globular lanterns, each not less than ten inches in diameter, in a vertical line one over the other, not less than three feet apart, and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least two miles; and shall by day carry in a vertical line, one over the other, not less than three feet apart, in front of but not lower than her foremast head, three black balls or shapes each two feet in diameter.

(b.) A ship, whether a steamship or a sailing ship, employed in laying or in picking up a telegraph cable, shall at night carry in the same position as the white light which steamships are required to carry, and, if a steamship, in place of that light, three lights in globular lanterns each not less than ten inches in diameter, in a vertical line over one another, not less than six feet apart; the highest and lowest of these lights shall be red, and the middle light shall be white, and they shall be of such a character that the red lights shall be visible at the same distance as the white light. By day she shall carry in a vertical line one over the other, not less than six feet apart, in front of but not lower than her foremast head, three shapes not less than two feet in diameter, of which the top and bottom shall be globular in shape and red in colour, and the middle one diamond in shape, and white (*a*).

(c.) The ships referred to in this Article, when not making any way through the water, shall not carry the side lights, but when making way shall carry them.

(d.) The lights and shapes required to be shown by this Article are to be taken by other ships as signals that the ship showing them is not under command, and cannot therefore get out of the way.

(*a*) See 48 & 49 Vict. c. 49, s. 5.

The signals to be made by ships in distress and requiring assistance are contained in Art. 27.

Art. 6. A sailing ship under way, or being towed, shall carry the same lights as are provided by Art. 3 for a steamship under way with the exception of the white light, which she shall never carry.

Art. 7. Whenever, as in the case of small vessels during bad weather, the green and red side lights cannot be fixed, these lights shall be kept on deck, on their respective sides of the vessel, ready for use; and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side, nor the red light on the starboard side.

To make the use of these portable lights more certain and easy, the lanterns containing them shall each be painted outside with the colour of the light they respectively contain, and shall be provided with proper screens.

Art. 8. A ship, whether a steamship or a sailing ship, when at anchor shall carry, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light, in a globular lantern of not less than eight inches in diameter, and so constructed as to show a clear uniform and unbroken light visible all round the horizon at a distance of at least one mile.

Art. 9. A pilot vessel, when engaged on her station on pilotage duty, shall not carry the lights required for other vessels, but shall carry a white light at the masthead, visible all round the horizon, and shall also exhibit a flare-up light or flare-up lights at short intervals, which shall never exceed fifteen minutes.

A pilot vessel, when not engaged on her station on pilotage duty, shall carry lights similar to those of other ships.

Art. 10. Open boats and fishing vessels of less than twenty tons net registered tonnage, when under way and when not having their nets, trawls, dredges or lines in the water, shall not be obliged to carry the coloured side-lights; but every such boat and vessel shall in lieu thereof have ready at hand a lantern with a green glass on the one side, and a red glass on the other side, and, on approaching to or being approached by another vessel, such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side nor the red light on the starboard side.

The following portion of this Article applies only to fishing vessels and boats when in the sea off the coast of Europe lying north of Cape Finisterre :—

(a.) All fishing vessels and fishing boats of twenty tons net registered tonnage or upwards when under way and

when not required by the following regulations in this Article to carry and show the lights therein named, shall carry and show the same lights as other vessels under way.

(b.) All vessels when engaged in fishing with drift nets shall exhibit two white lights from any part of the vessel where they can be best seen. Such lights shall be placed so that the vertical distance between them shall be not less than six feet and not more than ten feet; and so that the horizontal distance between them measured in a line with the keel of the vessel shall be not less than five feet and not more than ten feet. The lower of these two lights shall be the more forward, and both of them shall be of such a character, and contained in lanterns of such construction as to show all round the horizon on a dark night with a clear atmosphere, for a distance of not less than three miles.

(c.) A vessel employed in line fishing with her lines out shall carry the same lights as a vessel when engaged in fishing with drift nets.

(d) If a vessel when fishing becomes stationary in consequence of her gear getting fast to a rock or other obstruction, she shall show the light and make the fog signal for a vessel at anchor.

(e.) Fishing vessels and open boats may at any time use a flare-up in addition to the lights which they are by this Article required to carry and show. All flare-up lights exhibited by a vessel when trawling, dredging, or fishing with any kind of drag net shall be shown at the after part of the vessel, excepting that, if the vessel is hanging by the stern to her trawl, dredge or drag net, they shall be exhibited from the bow.

(f.) Every fishing vessel and every open boat when at anchor between sunset and sunrise shall exhibit a white light visible all round the horizon at a distance of at least one mile.

(g.) In fog, mist or falling snow, a drift net vessel attached to her nets and a vessel when trawling, dredging, or fishing with any kind of drag net, and a vessel employed in line fishing with her lines out, shall at intervals of not more than two minutes make a blast with her fog-horn and ring her bell alternately (*b*).

Art. 11. A ship which is being overtaken by another shall

(*b*) Article 10 of the Regulations of 1880, applicable to certain foreign fishermen and to British fishermen in certain waters, and an Order in Council of 30th December, 1884, as to British trawlers' lights in the seas north of Finisterre, are set out below, p. 544.

show from her stern to such last-mentioned ship a white light or a flare-up light.

Sound Signals for Fog, &c.

Art. 12. A steamship shall be provided with a steam whistle or other efficient steam sound signal, so placed that the sound may not be intercepted by any obstructions, and with an efficient fog-horn to be sounded by a bellows or other mechanical means, and also with an efficient bell (*c*). A sailing ship shall be provided with a similar fog-horn and bell.

In fog, mist or falling snow, whether by day or night, the signals described in this Article shall be used as follows; that is to say,

(a.) A steamship under way shall make with her steam-whistle, or other steam sound signal, at intervals of not more than two minutes, a prolonged blast.

(b.) A sailing ship under way shall make with her fog-horn, at intervals of not more than two minutes, when on the starboard tack one blast, when on the port tack two blasts in succession, and when with the wind abaft the beam three blasts in succession.

(c.) A steamship and a sailing-ship when not under way shall, at intervals of not more than two minutes, ring the bell.

Speed of Ships to be Moderate in Fog, &c.

Art. 13. Every ship, whether a sailing ship or steam-ship, shall, in a fog, mist or falling snow, go at a moderate speed.

Steering and Sailing Rules.

Art. 14. When two sailing ships are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other, as follows, viz. :—

(a.) A ship which is running free shall keep out of the way of a ship which is close-hauled.

(b.) A ship which is close-hauled on the port tack shall keep out of the way of a ship which is close-hauled on the starboard tack.

(c.) When both are running free with the wind on different sides, the ship which has the wind on the port side shall keep out of the way of the other.

(d.) When both are running free with the wind on the

(*c*) The following note is appended to the Order in Council: "In all cases where the Regulations require a bell to be used a drum will be substituted on board Turkish vessels."

same side, the ship which is to windward shall keep out of the way of the ship which is to leeward.

(e.) A ship which has the wind aft shall keep out of the way of the other ship.

Art. 15. If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.

This Article only applies to cases where ships are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two ships which must, if both keep on their respective courses, pass clear of each other.

The only cases to which it does apply are when each of the two ships is end on, or nearly end on, to the other; in other words, to cases in which, by day, each ship sees the masts of the other in a line, or nearly in a line, with her own; and, by night, to cases in which each ship is in such a position as to see both the side lights of the other.

It does not apply by day, to cases in which a ship sees another ahead crossing her own course; or by night, to cases where the red light of one ship is opposed to the red light of the other, or where the green light of one ship is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.

Art. 16. If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other.

Art. 17. If two ships, one of which is a sailing-ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing-ship.

Art. 18. Every steamship when approaching another ship so as to involve risk of collision shall slacken her speed, or stop and reverse, if necessary.

Art. 19. In taking any course authorized or required by these Regulations a steamship under way may indicate that course to any other ship which she has in sight by the following signals on her steam whistle, viz.:—

One short blast to mean "I am directing my course to starboard."

Two short blasts to mean "I am directing my course to port."

Three short blasts to mean "I am going full speed astern."

The use of thse signals is optional; but if they are used,

the course of the ship must be in accordance with the signal made.

Art. 20. Notwithstanding anything contained in any preceding Article, every ship, whether a sailing-ship or a steamship, overtaking any other, shall keep out of the way of the overtaken ship.

Art. 21. In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship.

Art. 22. Where by the above rules one of two ships is to keep out of the way, the other shall keep her course.

Art. 23. In obeying and construing these rules, due regard shall be had to all dangers of navigation; and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

No Ship under any circumstances to neglect proper Precautions.

Art. 24. Nothing in these rules shall exonerate any ship or the owner, master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Reservation of Rules for Harbours and Inland Navigation.

Art. 25. Nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbour, river or inland navigation.

Special Lights for Squadrons and Convoys.

Art. 26. Nothing in these rules shall interfere with the operation of any special rules made by the government of any nation with respect to additional station and signal lights for two or more ships of war, or for ships sailing under convoy.

Art. 27. When a ship is in distress and requires assistance from other ships or from the shore, the following shall be the signals to be used or displayed by her, either together or separately: that is to say—

In the daytime—

1. A gun fired at intervals of about a minute;
2. The international code signal of distress indicated by N. C.;
3. The distant signal, consisting of a square flag, having either above or below it a ball, or anything resembling a ball.

At night—

1. A gun fired at intervals of about a minute;
2. Flames on the ship (as from a burning tar barrel, oil barrel, &c.);
3. Rockets or shells, throwing stars of any colour or description, fired one at a time, at short intervals.

Article 10 *of the Regulations of* 1880.

Art. 10. (a.) Open fishing-boats and other open boats when under way shall not be obliged to carry the side lights required for other vessels; but every such boat shall, in lieu thereof, have ready at hand a lantern with a green glass on the one side and a red glass on the other side; and on the approach of or to other vessels, such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side, nor the red light on the starboard side.

(b.) A fishing vessel and an open boat when at anchor shall exhibit a bright white light.

(c.) A fishing vessel, when employed in drift net fishing, shall carry on one of her masts two red lights in a vertical line one over the other, not less than three feet apart.

(d.) A trawler at work shall carry on one of her masts two lights in a vertical line one over the other, not less than three feet apart, the upper light red, and the lower green, and shall also either carry the side lights required for other vessels, or if the side lights cannot be carried, have ready at hand the coloured lights as provided in Art. 7, or a lantern with a red and a green slide as described in paragraph (a.) of this Article.

(e.) Fishing vessels and open boats shall not be prevented from using a flare-up in addition, if they desire to do so.

(f.) The lights mentioned in this Article are substituted for those mentioned in the 12th, 13th, and 14th Articles of the Convention scheduled to the Sea Fisheries Act, 1868 (*d*).

(g.) All lights required by this Article, except side lights, shall be in globular lanterns so constructed as to show all round the horizon.

The following Regulation, applicable only to British fishing craft in the waters mentioned below, was made by Order in Council of 30th Dec. 1884. After reciting the power to modify Regulations given by 25 & 26 Vict. c. 63, and Articles 3, 6, and 10 of the Regulations of 1884, the order proceeds as follows:—

As regards steam vessels engaged in trawling when under steam, such vessels, if of twenty tons gross register tonnage

(*d*) See *supra*, p. 385, for this Act and others which affect it. The convention has never been in force.

or upwards, and having their trawls in the water, and not being stationary in consequence of their gear getting fast to a rock or other obstruction, shall, between sunset and sunrise, either carry and show the lights required by the said recited Art. 3 of the Regulations aforesaid, or shall carry and show in lieu thereof and in substitution therefor, but not in addition thereto, other lights of the description set forth in Part I. of the Schedule hereto.

As regards sailing vessels engaged in trawling, such vessels, if of twenty tons net register tonnage or upwards, and having their trawls in the water, and not being stationary in consequence of their gear getting fast to a rock or other obstruction, shall, between sunset and sunrise, either carry and show the lights required by the said recited Art. 6 of the Regulations aforesaid, or shall carry and show in lieu thereof and in substitution therefor, but not in addition thereto, other lights of the description set forth in Part II. of the Schedule hereto.

The red and green lights, which are by this Order permitted as aforesaid to be carried in lieu of the lights required by Art. 3 and Art. 6 of the said recited Regulations respectively, shall be of such a character as to be visible at a distance of not less than two miles on a dark night with a clear atmosphere.

And her Majesty is pleased further to direct that steam vessels of twenty tons gross register tonnage or upwards, and sailing vessels of twenty tons net register tonnage or upwards engaged in trawling, when under way between sunset and sunrise, but not having their trawls in the water, shall, if steamships, carry and show the lights required by Art. 3 above recited, and if sailing ships shall carry and show the lights required by Art. 6 above recited. Provided, however, that the modifications and additions set forth in Parts I., II., of the Schedule hereto shall not be applicable to the fishing vessels and boats of any foreign country unless and until the same shall have been made applicable thereto by Order in Council.

SCHEDULE.

PART I.—*Steam Vessels.*

(1) On or in front of the foremast head, and in the same position as the white light which other steamships are required to carry, a lanthorn (*sic*) showing a white light ahead, a green light on the starboard side, and a red light on the port side.

Such lanthorn shall be so constructed, fitted, and arranged, as to show an uniform and unbroken white light over an arc of the horizon of four points of the compass, and an uniform and unbroken green light over an arc of the horizon of ten points of the compass, and an uniform and unbroken red light over an arc of the horizon of ten points of the compass; and it shall be so fixed as to show the white light from right ahead to two points on the bow on each side of the ship, the green light from two points on the starboard bow to four points abaft the beam on the starboard side, and the red light from two points on the port bow to four points abaft the beam on the port side; and (2) a white light in a globular lanthorn of not less than eight inches in diameter and so constructed as to show a clear uniform and unbroken light all round the horizon. The lanthorn containing such white light shall be carried lower than the lanthorn showing the green, white and red lights as aforesaid, so, however, that the vertical distance between them shall not be less than six feet nor more than twelve feet.

PART II.—*Sailing Vessels.*

(1) On or in front of the foremast head, a lanthorn having a green glass on the starboard side and a red glass on the port side, so constructed, fitted, and arranged that the red and green do not converge, and so as to show an uniform and unbroken green light over an arc of the horizon of twelve points of the compass, and an uniform and unbroken red light over an arc of the horizon of twelve points of the compass, and it shall be so fixed as to show the green light from right ahead to four points abaft the beam on the starboard side, and the red light from right ahead to four points abaft the beam on the port side; and (2) a white light in a globular lanthorn of not less than eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light all round the horizon. The lanthorn containing such white light shall be carried lower than the lanthorn showing the said green and red lights as aforesaid, so, however, that the vertical distance between them shall not be less than six feet and not more than twelve feet.

Part II. of the last-mentioned regulation was further modified by Order in Council of the 24th of June, 1885. After reciting the power to modify the Regulations, the Order in Council of December 30th, 1884, and the joint recommendation of the Admiralty and the Board of Trade, the Order proceeds as follows:—

As regards sailing vessels engaged in trawling, such vessels having their trawls in the water and not being stationary in

consequence of their gear getting fast to a rock or other obstruction, if they do not carry and show the lights required by Art. 6 of the Regulations aforesaid, or the other lights of the description set forth in Part II. of the schedule to the said recited Order in Council of the 30th of December, 1884, shall carry and show in lieu of the lights required by Art. 6 of the Regulations aforesaid, or the other lights of the description set forth in paragraph 2 of the Schedule to the said recited Order, other lights as follows: that is to say,—

A white light in a globular lanthorn of not less than eight inches in diameter, and so constructed as to show a clear uniform and unbroken light all round the horizon, and visible on a dark night, with a clear atmosphere, for a distance of at least two miles; and also a sufficient supply of red pyrotechnic lights which shall each burn for at least thirty seconds, and shall, when so burning, be visible for the same distance under the same conditions as the white light. The white light shall be shown from sunset to sunrise, and one of the red pyrotechnic lights shall be shown on approaching, or on being approached by, another ship or vessel in sufficient time to prevent collision.

Now, therefore, Her Majesty, by virtue of the powers vested in her by the said Act, and by and with the advice of her Privy Council, is pleased to direct that on and after the 24th day of June, 1885, the Regulations contained in the Schedule to the Order in Council of the 11th day of August, 1884, shall, as regards British sailing fishing vessels and boats, when in the sea off the coast of Europe, lying north of Cape Finisterre, be further modified and added to accordingly; that is to say, such sailing vessels shall, whatever be their tonnage, be at liberty to carry the substituted lights hereinbefore described in lieu of, and in substitution for, but not in addition to, the lights prescribed to be carried by such sailing vessels by the Orders in Council dated respectively the 11th day of August, 1884, and the 30th day of December, 1884.

The following are the Regulations approved at the International Marine Conference held at Washington in 1889—1890 (*a*):—

REGULATIONS FOR PREVENTING COLLISIONS AT SEA.

Schedule I

Preliminary.

These Rules shall be followed by all vessels upon the high seas and in all waters connected therewith navigable by sea-going vessels.

In the following Rules every steam vessel which is under sail and not under steam is to be considered a sailing vessel, and every vessel under steam, whether under sail or not, is to be considered a steam vessel.

The words "*steam vessel*" shall include any vessel propelled by machinery.

A vessel is "*under way*" within the meaning of these Rules when she is not at anchor, or made fast to the shore, or aground.

Rules concerning Lights, &c.

The word "*visible*" in these Rules, when applied to lights, shall mean visible on a dark night with a clear atmosphere.

Art. 1. The Rules concerning lights shall be complied with in all weathers from sunset to sunrise, and during such time no other lights which may be mistaken for the prescribed lights shall be exhibited.

Art. 2. A steam vessel when under way shall carry—

(a) On or in front of the foremast, or if a vessel without a foremast, then in the fore part of the vessel, at a height above the hull of not less than twenty feet, and if the breadth of the vessel exceeds twenty feet, then at a height above the hull not less than such breadth, so, however, that the light need not be carried at a greater height above the hull than forty feet, a bright white light, so constructed as to show an unbroken light over an arc of the horizon of

(*a*) These Regulations have not as yet (January, 1891) become law.

twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel, viz., from right ahead to two points abaft the beam on either side, and of such a character as to be visible at a distance of at least five miles.

(b) On the starboard side a green light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible at least two miles.

(c) On the port side a red light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible at a distance of at least two miles.

(d) The said green and red lights shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

(e) A steam vessel when under way may carry an additional white light similar in construction to the light mentioned in sub-division (a). These two lights shall be so placed in line with the keel that one shall be at least fifteen feet higher than the other, and in such a position with reference to each other that the lower light shall be forward of the upper one. The vertical distance between these lights shall be less than the horizontal distance.

Art. 3. A steam vessel, when towing another vessel, shall, in addition to her side lights, carry two bright white lights in a vertical line one over the other, not less than six feet apart, and when towing more than one vessel shall carry an additional bright white light six feet above or below such lights, if the length of the tow, measuring from the stern of the towing-vessel to the stern of the last vessel towed, exceeds 600 feet. Each of these lights shall be of the same construction and character, and shall be carried in the same position as the white light mentioned in Article 2 (a), excepting the additional light, which may be carried at a height of not less than fourteen feet above the hull.

Such steam vessel may carry a small white light abaft the funnel or aftermast for the vessel towed to steered by, but such light shall not be visible forward of the beam.

Art. 4.—(a) A vessel which, from any accident, is not under command shall carry at the same height as the white light

mentioned in Article 2 (a) where they can best be seen, and, if a steam vessel, in lieu of that light, two red lights in a vertical line one over the other, not less than six feet apart, and of such a character as to be visible all round the horizon at a distance of at least two miles; and shall by day carry in a vertical line one over the other, not less than six feet apart, where they can best be seen, two black balls or shapes, each two feet in diameter.

(b) A vessel employed in laying or in picking up a telegraph cable shall carry in the same position as the white light mentioned in Article 2 (a), and, if a steam vessel, in lieu of that light, three lights in a vertical line one over the other, not less than six feet apart. The highest and lowest of these lights shall be red, and the middle light shall be white, and they shall be of such a character as to be visible all round the horizon at a distance of at least two miles. By day she shall carry in a vertical line one over the other, not less than six feet apart, where they can best be seen, three shapes not less than two feet in diameter, of which the highest and lowest shall be globular in shape and red in colour, and the middle one diamond in shape and white.

(c) The vessels referred to in this Article, when not making way through the water, shall not carry the sidelights, but when making way shall carry them.

(d) The lights and shapes required to be shown by this Article are to be taken by other vessels as signals that the vessel showing them is not under command, and cannot therefore get out of the way.

These signals are not signals of vessels in distress and requiring assistance. Such signals are contained in Article 31.

Art. 5. A sailing vessel under way, and any vessel being towed, shall carry the same lights as are prescribed by Article 2 for a steam-vessel under way, with the exception of the white lights mentioned therein, which they shall never carry.

Art. 6. Whenever, as in the case of small vessels, under way during bad weather, the green and red side lights cannot be fixed, these lights shall be kept at hand, lighted and ready for use; and shall on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such a manner as to make them most visible, and so that the green light shall not be seen on the port side, nor the red light on the starboard side, nor, if practicable, more than two points abaft the beam on their respective sides.

To make the use of these portable lights more certain and easy, the lanterns containing them shall each be painted outside with the colour of the light they respectively contain, and shall be provided with proper screens.

Art. 7. Steam-vessels of less than forty and vessels under oars or sails of less than twenty tons gross tonnage respectively, when under way shall not be obliged to carry the lights mentioned in Article 2, (a), (b), and (c); but if they do not carry them they shall be provided with the following lights:

1. Steam-vessels of less than forty tons shall carry:
   (a) In the fore part of the vessel, or on or in front of the funnel, where it can best be seen, and at a height above the gunwale of not less than nine feet, a bright white light constructed and fixed as prescribed in Article 2 (a), and of such a character as to be visible at a distance of at least two miles.
   (b) Green and red side lights constructed and fixed as prescribed in Article 2, (b) and (c), and of such a character as to be visible at a distance of at least one mile, or a combined lantern showing a green light and a red light from right ahead to two points abaft the beam on their respective sides. Such lantern shall be carried not less than three feet below the white light.
2. Small steam-boats, such as are carried by sea-going vessels, may carry the white light at a less height than nine feet above the gunwale, but it shall be carried above the combined lantern mentioned in sub-division 1 (b).
3. Vessels under oars or sails of less than twenty tons shall have ready at hand a lantern with a green glass on one side and a red glass on the other, which, on the approach of or to other vessels, shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side nor the red light on the starboard side.

The vessels referred to in this Article shall not be obliged to carry the lights prescribed by Article 4 (a) and Article 11, last paragraph.

Art. 8. Pilot vessels, when engaged on their station on pilotage duty, shall not show the lights required for other vessels, but shall carry a white light at the mast-head, visible all round the horizon, and shall also exhibit a flare-up light or flare-up lights at short intervals, which shall never exceed fifteen minutes.

On the near approach of or to other vessels they shall have their side-lights lighted ready for use, and shall flash or show them at short intervals to indicate the direction in which they are heading, but the green light shall not be shown on the port side, nor the red light on the starboard side.

A pilot vessel of such a class as to be obliged to go along-

side of a vessel to put a pilot on board may show the white light instead of carrying it at the masthead, and may instead of the coloured lights above mentioned have at hand ready for use a lantern with a green glass on the one side and a red glass on the other, to be used as prescribed above.

Pilot-vessels when not engaged on their stations on pilotage duty shall carry lights similar to those of other vessels of their tonnage.

Art. 9. Fishing vessels and fishing boats, when under way and when not required by this Article to carry or show the lights therein named, shall carry or show the lights prescribed for vessels of their tonnage under way.

(a) Vessels and boats when fishing with drift nets shall exhibit two white lights from any part of the vessel where they can best be seen. Such lights shall be placed so that the vertical distance between them shall be not less than six feet and not more than ten feet, and so that the horizontal distance between them, measured in a line with the keel, shall be not less than five feet and not more than ten feet. The lower of these two lights shall be the more forward, and both of them shall be of such a character as to show all round the horizon, and to be visible at a distance of not less than three miles.

(b) Vessels when engaged in trawling, by which is meant the dragging of an apparatus along the bottom of the sea—

1. If steam-vessels, shall carry in the same position as the white light mentioned in Article 2 (a), a tri-coloured lantern, so constructed and fixed as to show a white light from right ahead to two points on each bow, and a green light and a red light over an arc of the horizon from two points on either bow to two points abaft the beam on the starboard and port side respectively; and not less than six nor more than twelve feet below the tricoloured lantern a a white light in a lantern, so constructed as to show a clear, uniform, and unbroken light all round the horizon.

2. If sailing vessels of seven tons gross tonnage and upwards, shall carry a white light in a lantern, so constructed as to show a clear, uniform, and unbroken light all round the horizon, and shall be provided with a sufficient supply of red pyrotechnic lights, which shall each burn for at least thirty seconds, and shall be shown on the approach of or to other vessels in sufficient time to prevent collision.

In the Mediterranean Sea the vessels referred to in sub-division (b) 2 may use a flare-up light in lieu of a pyrotechnic light.

All lights mentioned in sub-division (b), (1) and (2), shall be visible at a distance of at least two miles.

3. If sailing-vessels of less than seven tons gross tonnage, shall not be obliged to carry the white light mentioned in sub-division (b) 2 of this Article; but if they do not carry such light, they shall have at hand, ready for use, a lantern showing a bright white light, which shall, on the approach of or to other vessels, be exhibited where it can best be seen in sufficient time to prevent collision; and they shall also show a red pyrotechnic light, as prescribed in sub-division (b) (2), or in lieu thereof a flare-up light.

(c) Vessels and boats when line fishing with their lines out and attached to their lines, and when not at anchor or stationary, shall carry the same lights as vessels fishing with drift nets.

(d) Fishing vessels and fishing boats may at any time use a flare-up light in addition to the lights which they are by this Article required to carry and show. All flare-up lights exhibited by a vessel when trawling or fishing with any kind of drag net shall be shown at the after part of the vessel, excepting that, if the vessel is hanging by the stern to her fishing gear, they shall be exhibited from the bow.

(e) Every fishing vessel and every boat when at anchor shall exhibit a white light visible all round the horizon at a distance of at least one mile.

(f) If a vessel or boat when fishing becomes stationary in consequence of her gear getting fast to a rock or other obstruction, she shall show the light and make the fog signal prescribed for a vessel at anchor, respectively.

(*See Article* 15 (d), (e) *and last paragraph.*)

(g) In fog, mist, falling snow, or heavy rain-storms, drift net vessels attached to their nets, and vessels when trawling, dredging, or fishing with any kind of drag net, and vessels line fishing with their lines out, shall, if of twenty tons gross tonnage or upwards respectively, at intervals of not more than one minute, make a blast; if steam-vessels with the whistle or siren, and if sailing vessels with the fog horn, each blast to be followed by ringing the bell.

(h) Sailing vessels or boats fishing with nets or lines or

trawls, when under way, shall in day time indicate their occupation to an approaching vessel by displaying a basket or other efficient signal where it can best be seen.

The vessels referred to in this Article shall not be obliged to carry the lights prescribed by Article 4 (a) and Article 11, last paragraph.

Art. 10. A vessel which is being overtaken by another shall show from her stern to such last-mentioned vessel a white light or a flare-up light.

The white light required to be shown by this Article may be fixed and carried in a lantern; but in such case the lantern shall be so constructed, fitted, and screened that it shall throw an unbroken light over an arc of the horizon of twelve points of the compass, viz. for six points from right aft on each side of the vessel, so as to be visible at a distance of at least one mile. Such light shall be carried as nearly as practicable on the same level as the side lights.

Art. 11. A vessel under 150 feet in length, when at anchor, shall carry forward where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a lantern, so constructed as to show a clear, uniform, and unbroken light visible all round the horizon at a distance of at least one mile.

A vessel of 150 feet or upwards in length, when at anchor, shall carry in the forward part of the vessel, at a height of not less than twenty and not exceeding forty feet above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall not be less than fifteen feet lower than the forward light another such light.

The length of a vessel shall be deemed to be the length appearing in her certificate of registry.

A vessel aground in or near a fairway shall carry the above light or lights, and the two red lights prescribed by Art. 4 (a).

Art. 12. Every vessel may, if necessary in order to attract attention, in addition to the lights which she is by these Rules required to carry, show a flare-up light, or use a detonating signal that cannot be mistaken for a distress signal.

Art. 13. Nothing in these rules shall interfere with the operation of any special rules made by the Government of any nation with respect to additional station and signal lights for two or more ships of war, or for vessels sailing under convoy, or with the exhibition of recognition signals adopted by shipowners, which have been authorized by their respective Governments and duly registered and published.

Art. 14. A steam-vessel proceeding under sail only, but

having her funnel up, shall carry in day time forward, where it can best be seen, one black ball or shape two feet in diameter.

Sound Signals for Fog, &c.

Art. 15. All signals prescribed by this Article for vessels under way shall be given:

(1) By "*steam vessels*" on the whistle or siren;

(2) By "*sailing vessels and vessels towed*" on the fog horn.

The words "*prolonged blast*" used in this Article shall mean a blast of from four to six seconds' duration.

A steam vessel shall be provided with an efficient whistle or siren sounded by steam or some substitute for steam, so placed that the sound may not be intercepted by any obstruction, and with an efficient fog horn to be sounded by mechanical means, and also with an efficient bell (*a*). A sailing vessel of twenty tons gross tonnage or upwards shall be provided with a similar fog horn and bell.

In fog, mist, falling snow, or heavy rain storms, whether by day or night, the signals described in this Article shall be used as follows, viz.:—

(a) A steam vessel having way upon her shall sound at intervals of not more than two minutes a prolonged blast.

(b) A steam vessel under way, but stopped and having no way upon her, shall sound at intervals of not more than two minutes two prolonged blasts with an interval of about one second between them.

(c) A sailing vessel under way shall sound at intervals of not more than one minute when on the starboard tack one blast, when on the port tack two blasts in succession, and when with the wind abaft the beam, three blasts in succession.

(d) A vessel when at anchor shall at intervals of not more than one minute ring her bell rapidly for about five seconds.

(e) A vessel at anchor at sea, when not in ordinary anchorage ground, and when in such a position as to be an obstruction to vessels under way, shall sound, if a steam vessel, at intervals of not more than two minutes, two prolonged blasts with her whistle or siren, followed by ringing her bell; or if a sailing vessel, at intervals of not more than one

(*a*) In all cases where the Rules require a bell to be used, a drum may be substituted on board Turkish vessels, or a gong where such articles are used on board small sea-going vessels.

minute two blasts with her fog horn, followed by ringing her bell.

(e) A vessel when towing shall, instead of the signals prescribed in sub-divisions (a) and (c) of this Article, at intervals of not more than two minutes, sound three blasts in succession, viz., one prolonged blast, followed by two short blasts. A vessel towed may give this signal, and she shall not give any other.

(g) A steam vessel wishing to indicate to another, "The way is off my vessel; you may feel your way past me," may sound three blasts in succession, viz., short, long, short, with intervals of about one second between them.

(h) A vessel employed in laying or in picking up a telegraph cable shall, on hearing the fog signal of an approaching vessel, sound in answer three prolonged blasts in succession.

(i) A vessel under way which is unable to get out of the way of an approaching vessel through being not under command, or unable to manœuvre as required by these Rules, shall, on hearing the fog signal of an approaching vessel, sound in answer four short blasts in succession.

Sailing vessels and boats of less than twenty tons gross tonnage shall not be obliged to give the above-mentioned signals; but if they do not, they shall make some other efficient sound signal at intervals of not more than one minute.

Speed of Ships to be Moderate in Fog, &c.

Art. 16. Every vessel shall in a fog, mist, falling snow, or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

A steam vessel hearing apparently forward of her beam the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

STEERING AND SAILING RULES.

Preliminary—Risk of Collision.

Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an

approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist.

Art. 17. When two sailing vessels are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other as follows, viz. :—

(a) A vessel which is running free shall keep out of the way of a vessel which is close-hauled.

(b) A vessel which is close-hauled on the port tack shall keep out of the way of a vessel which is close-hauled on the starboard tack.

(c) When both are running free, with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other.

(d) When both are running free, with the wind on the same side, the vessel which is to windward shall keep out of the way of the vessel which is to leeward.

(e) A vessel which has the wind aft shall keep out of the way of the other vessel.

Art. 18. When two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.

This Article only applies to cases where vessels are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two vessels which must, if both keep on their respective courses, pass clear of each other.

The only cases to which it does apply are when each of the two vessels is end on, or nearly end on, to the other; in other words, to cases in which by day each vessel sees the masts of the other in a line, or nearly in a line, with her own; and by night to cases in which each vessel is in such a position as to see both side lights of the other.

It does not apply by day to cases in which a vessel sees another ahead crossing her own course; or by night to cases where the red light of one vessel is opposed to the red light of the other, or where the green light of one vessel is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.

Art. 19. When two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

Art. 20. When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel.

Art. 21. Where by any of these rules one of two vessels is

to keep out of the way, the other shall keep her course and speed.

Art. 22. Every vessel which is directed by these Rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.

Art. 23. Every steam vessel which is directed by these Rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop and or reverse.

Art. 24. Notwithstanding anything contained in these Rules, every vessel overtaking any other shall keep out of the way of the overtaken vessel.

Every vessel coming up with another vessel from any direction more than two points abaft her beam, *i.e.*, in such a position with reference to the vessel which she is overtaking that at night she would be unable to see either of that vessel's side-lights, shall be deemed to be an overtaking vessel; and no subsequent alteration of bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these Rules, or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear.

As by day the overtaking vessel cannot always know with certainty whether she is forward of or abaft this direction from the other vessel, she should, if in doubt, assume that she is an overtaking vessel and keep out of the way.

Art. 25. In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such vessel.

Art. 26. Sailing vessels under way shall keep out of the way of sailing vessels or boats fishing with nets, or lines, or trawls. This Rule shall not give to any vessel or boat engaged in fishing the right of obstructing a fairway used by vessels other than fishing vessels or boats.

Art. 27. In obeying and construing these Rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above Rules necessary in order to avoid immediate danger.

Sound Signals for Vessels in sight of one another.

Art. 28. The words "short blast" used in this Article shall mean a blast of about one second's duration.

When vessels are in sight of one another, a steam vessel under way, in taking any course authorized or required by these Rules, shall indicate that course by the following signals on her whistle or siren, viz.:—

One short blast to mean, "I am directing my course to starboard."

Two short blasts to mean, "I am directing my course to port."
Three short blasts to mean, "My engines are going full speed astern."

No Vessel under any circumstances to neglect proper precautions.

Art. 29. Nothing in these Rules shall exonerate any vessel, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Reservation of Rules for Harbours and Inland Navigation.

Art. 30. Nothing in these Rules shall interfere with the operation of a special rule duly made by local authority relative to the navigation of any harbour, river, or inland water.

Schedule II

Distress Signals.

Art. 31. When a vessel is in distress, and requires assistance from other vessels or from the shore, the following shall be the signals to be used or displayed by her, either together or separately, viz. :—

In the daytime—

(1) A gun fired at intervals of about a minute.
(2) The International Code signal of distress indicated by N. C.
(3) The distant signal, consisting of a square flag having either above or below it a ball, or anything resembling a ball.
~~(4) Rockets or shells as prescribed below for use at night.~~
(4) A continuous sounding with any fog signal apparatus.

At night—

(1) A gun fired at intervals of about a minute.
(2) Flames on the vessel (as from a burning tar barrel, oil barrel, &c.).
(3) Rockets or shells ~~bursting in the air with a loud report~~, and throwing stars of any colour or description, fired one at a time at short intervals.
(4) A continuous sounding with any fog signal apparatus.

LOCAL RULES

(In Alphabetical Order of the Rivers and Places to which they relate).

BELFAST.

The bye-laws and regulations in force at Belfast, made, it seems, under 10 & 11 Vict. c. 52 (Local), are as follows:—

§ 67. That, when steam vessels on different courses must unavoidably or necessarily pass so near that by continuing their respective courses there would be a risk of coming in collision, the helm of each vessel shall be put to port, so that the one shall always pass on the larboard or port side of the other. Penalty for breach of this bye-law, a sum not exceeding five pounds for each offence.

§ 68. That a steam vessel passing another in the Channel and going in same direction shall always leave the vessel she is passing on the larboard or port hand, under a penalty of a sum not exceeding five pound for each offence.

§ 69. That, when two such vessels are proceeding in the same direction, either coming up or going down, the vessel astern shall on no account attempt to pass, when there is so little room from vessels being in the way, or other causes, as to occasion a risk of damage; and that the vessel ahead shall, when the other is passing, keep well over on the larboard or port side, and in no part of the Channel or harbour must she be allowed to cross the course of the vessel passing. Penalty for breach of any part of this bye-law, a sum not exceeding five pounds for each offence.

§ 70. That no tug-steamer shall take more than four vessels in tow at one time, nor have more than two abreast, under a penalty of a sum not exceeding five pounds for each offence.

§§ 72 and 73. (*Steamers to slow their engines in certain parts of the river and when passing dredgers.*)

ADDITIONAL RULES.

1st. That, when steamers are likely to meet at, or near the Holywood Lighthouse, the *outgoing steamer* ("being the one which has the other on her own starboard side") shall wait

until the *incoming steamer* has come round far enough to give her a clear course. Local rules (Belfast).

2nd. That no steamer shall swing in the harbour at such a time as to interfere with the arrival or departure of any other steamer.

3rd. That no irregular or casual trading steamer shall *leave* at a time that will interfere with or cause delay to an advertised steamer.

4th. That when two or more steamers are advertised to sail *at the same time*, the steamer which lies furthest down the harbour, or seawards, is expected to sail first, and in no case is the steamer which lies further up the harbour to leave her berth before the other further down, unless ordered to do so by the harbour-master or his deputy, or until the master has ascertained, by sounding his steam-whistle, that the other steamer is not ready to leave (*d*).

CARRON RIVER (GRANGEMOUTH).

The following rules, dated 18th January, 1873, were made under the local Acts 4 & 5 Vict. c. 55, and 30 & 31 Vict. c. 106:— Carron river.

1. (*Limits of harbour.*)

2. When vessels navigating the Carron river, proceeding in opposite directions, approach each other, they shall put their helms to port, and keep as near as possible to the right or starboard side of the river, so as to afford all possible facility for passing each other.

3. (*Ships and owners responsible for damage to river works, &c.*)

4. (*Preparation for docking; sails furled, &c.*)

5. No vessel shall lie or be moored at the entrance of the docks or harbour, or in the Carron river, so as to interrupt or impede the navigation.

6. No vessel shall enter the docks or harbour under sail, but must be warped in after having been brought up by hawsers run out to the palls on either side of the river. When there is a strong east wind or flood-tide, all vessels must have an anchor ready to let go, if necessary, after passing the mouth of Grangeburn.

(*d*) When a steam-whistle is sounded by a steamer lying further up the harbour to ascertain whether the river be clear, it will be the duty of the steamer further down to sound her whistle in reply, *if she is ready to start*, but to remain silent if not ready, in which case the upper steamer may leave.

Local rules (Carron river).

7. (*Vessels not to attempt to enter or leave the harbour, except at proper state of tide.*)

* * * * *

10. Steam vessels, while entering or leaving, or while in the Carron river, shall proceed at a rate not exceeding half-speed, and shall go at dead slow on approaching other vessels or when passing the dredging machine or punts.

11. Steam vessels shall not enter the entrance lock with too much way, or at a speed that would necessitate the backing of their engines; and shall be provided with proper check ropes, and use the same so as to prevent the vessel striking against the lock gates.

12. (*Ships to carry the regulation lights.*)

13. No vessel shall enter or leave the dock or harbour, except in the presence of the harbour master or his assistant.

* * * * *

24. (*Orders of harbour master or assistant to be obeyed.*)

* * * * *

46. In case of damage being done to any of the company's (Caledonian Railway Co.) works by vessels, rafts, or vehicles, the same shall be detained until satisfaction be made or sufficient security be found for payment.

51. (*Owner or master to be liable for damage and disobedience by persons on board.*)

THE CLYDE.

The Clyde.

Bye-laws of 6th August, 1889, made under 21 & 22 Vict. c. 149 (Local), and 50 Vict. sess. 2, c. 8 (Local).

1. (*Vessels over sixty tons to have pilot.*)

2. (*In daytime one hand, at night and in fog two hands, on the look-out.*)

3. (*Steam vessel or dredger turning or unable to keep out of the way to sound four or more blasts or strokes of her bell; thereupon the other vessel to keep out of the way.*)

4. (*Yards to be peaked; bowsprits and jibbooms run in or topped.*)

5. (*Anchors to be laid so as not to interfere with fairway. Bowsprits and jibbooms of vessels aground to be rigged in.*)

6. (*Vessels not to anchor or moor above Bowling, or inside the river walls.*)

7. (*Small boats prohibited in certain parts of the river.*)

8. (*Scows to have coamings eighteen inches high.*)

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11. (*At night and in dense fog speed not to exceed four miles an hour.*) Local rules (The Clyde).

* * * * *

14. When steam vessels proceeding in opposite directions are approaching one another, each shall, when within fifty yards of the other, slow her engines, and each shall alter her course to starboard, so that each shall pass to the port side of the other.

15. When two steam vessels are proceeding in the same direction, but with unequal speed, the slower vessel shall, when about to be overtaken, be kept sufficiently to the left or port side of the channel as to leave a free passage for the faster vessel, and shall be slowed, and, if necessary, the engines stopped, as soon as the faster vessel comes within fifty yards of her; and the engines of the faster vessel shall also be slowed, when within fifty yards of the slower vessel, until the latter shall be passed; and it shall be sufficient intimation to the slower vessel of the faster vessel's purpose of passing her that the bell of the faster vessel be twice rung and her engine whistle be twice sounded; but the faster vessel shall not attempt to pass the slower until the latter shall have given her room to pass safely. Failing that being done, the person in charge of the faster vessel shall report the offence to the pilot board in order that such offence may be dealt with.

Note.—The faster vessel should not claim to pass the slower at a narrow or otherwise difficult part of the river, and only when the course is free of other passing vessels.

16. A steam vessel meeting or overtaking any sailing vessel, or tug with sailing vessel or timber raft in tow, shall slow her engines when within fifty yards of such vessels, and shall continue slowing until she shall have passed the same; and when about to pass any vessel aground or at anchor shall slow her engines at least 150 yards from such vessel, and so continue until she shall have passed the same.

17. Every vessel when being overtaken by another vessel after dark shall show from her stern a white light until the other vessel shall have passed.

18. Vessels coming out of dock shall signify the same by a prolonged blast of the steam whistle of not less than five seconds' duration, and in cases where a vessel is not under steam the tug boat in attendance shall make the same signal.

19. Every steam vessel under her own steam, crossing from one side of the river towards the other side, shall keep out of the way of vessels navigating up and down the river.

20. (*Steamships to go dead slow past dredging machines, diving bells, and river works.*)

Local rules (The Clyde).

21. (*Steamships to go dead slow past notice boards to that effect.*)

22, 61, and 102. (*Steamships to go dead slow in certain parts of the river.*)

23. (*Tugs not to tow vessels alongside or abreast of each other, except certain small craft; tow not to exceed* 160 *yards in length.*)

25. (*Order of berthing of vessels arriving together at a wharf.*)

* * * * *

32. Every vessel when on the river shall conform to the Board of Trade Rules with regard to lights; and every vessel moored to the buoys shall, between sunset and sunrise, have a white light exhibited in a globular lantern of not less than eight inches in diameter, placed in a conspicuous situation, and raised at least twelve feet above the deck, so as to show a clear, uniform, and unbroken light all round the horizon.

33. (*Sunken vessel to be lit by two red lights and a white light. A look-out man to be on board or in a boat, and to show red flags in daytime.*)

As to Launches.

34. (*Two small boats to lie in the river* 200 *yards above and below the launch; pilot of launch to show red flag with "launch" in white letters five minutes before launch; the boats thereupon to show similar flags; no craft in the river to pass boats so signalling until launch is over; if launch delayed, pilot to show white flag and boats to withdraw their red flags; twenty-four hours' notice of launch to be given to harbour-master; delay of traffic by launch.*)

* * * * *

110. (*Horse boats and steam ferry boats to carry white light twelve feet above the deck.*)

A code of rules dated 9th February, 1859, confirmed on the 11th April, 1859, and made under 10 Vict. c. 27 (Local), and 21 & 22 Vict. c. 149 (Local), by the Clyde Pilot Board, contains the following directions:—

11. (*Vessels not to anchor in the fairway of the Firth.*)

12. All vessels propelled by the power of steam, or sailing with a fair wind and falling in with vessels beating to windward, shall alter their course in sufficient time to pass astern of the vessel so beating. All vessels beating to windward, and meeting on opposite tacks, shall avoid getting foul of each other by the vessel on the starboard tack keeping to the wind, and the vessel on the port tack bearing up so as to pass easily astern of the other—all under a penalty of 5*l.*

13. (*Steamship not to race, or pass within fifty yards of one ahead.*) Local rules (The Clyde).

14. (*Appears to require the lights described in the Regulations for Preventing Collisions at Sea, made under 25 & 26 Vict. c. 63, to be carried.*)

CORK.

Cork.

The bye-laws and regulations of 9th June, 1869, for preventing collisions, in force at Cork (under 1 Geo. IV. c. 52, and the Cork Harbour Amendment Act, 1866), are substantially the same as the General Regulations. There are, however, some variations and additions, the principal of which are as follows:—The local rules are expressly made applicable to steam and sailing lighters; the fog-horn or bell is to be sounded once every minute; and there are special provisions for speed when passing dredgers and other craft, and for the navigation of rafts of timber. Rules 85, 89, 90, and 91, are as follows:—

85. When any steam vessels moving in opposite directions shall approach each other, the masters shall respectively slow engines as soon as such vessels shall come within one hundred yards of each other, and shall cause the respective vessels to keep as near as they can towards the side of the river to the right or starboard, so as to afford all possible facility to each other to pass.

89. Every steam vessel, when navigating any narrow channel, shall, whenever it is safe and practicable, keep to that side of the fairway or midchannel, which lies on the starboard side of such steam vessel.

90. No steam vessel shall race, or attempt or strive or race, the one against the other; nor shall any steam vessel attempt to come in the wake of another steam vessel between Horse-head and the sea, nor pass one proceeding in the same direction, except at a safe distance; and the slower moving vessel shall allow the faster moving vessel freely to pass.

91. The master, or other person in charge of steam vessels, shall not proceed at any greater speed than quarter speed in any part of the river west of the east end of Myrtle Hill Terrace.

DUBLIN.

Dublin.

Bye-laws made under the Dublin Port and Docks Act, 1869, and confirmed on the 2nd December, 1884, provide that:—

1. (*All vessels to navigate on the starboard side of midchannel.*)

2. (*Vessels crossing to their wrong side do so at their own risk.*)

Local rules (Dublin).

3. (*Overtaken steamer to keep on starboard side and allow other vessel to pass.*)

4. (*Ships' lights to be those of the Regulations for Preventing Collisions at Sea.*)

5. (*Ships at anchor to exhibit a white light not more than twenty feet from deck; to ring bell in fog.*)

6. (*Steamships to go slow, quarter speed, or stop engines at certain places.*)

8. Ships not to anchor between Poolby Lighthouse and Custom House.

GRANGEMOUTH. (*See* CARRON RIVER.)

HOLYHEAD.

Holyhead.

At Holyhead, by Regulations of the 1st December, 1877, issued by order of the Board of Trade, and signed by the harbour-master, ships are warned against bringing up outside the breakwater, or in the fairway, where they are in the track of packets; if unavoidably brought up in the fairway masters are particularly requested to exhibit two riding lights, one at the peak and one forward; when navigating the fairway at night vessels should burn a flare-up or bright light; small vessels should come into the harbour of refuge and leave the outer anchorage for large ships; vessels riding in the harbours or roadsteads are to exhibit the Regulation riding light; vessels are not to enter the inner harbour at a high rate of speed, or endanger the packets alongside the jetties; in bad weather vessels are to be securely anchored and made snug; coming round the breakwater vessels are to go at reduced speed, as they are coming round a blind corner; the mail packets burn a red flashing light when rounding the breakwater; and when swinging and blocking the entrance the red flash light is burnt and fog-bell sounded; when the harbour is clear a green flash light is burnt.

HUMBER.

Humber.

The following rules were made under the powers of 25 & 26 Vict. c. 63, by Order in Council of 8th February, 1890 (*a*). They are to be read in connection with rules made by Order in Council of 7th March, 1887. An infringement of them brings a ship within the penalty of 35 & 36 Vict. c. 85, s. 17; *The Ripon*, 10 P. D. 65.

I. All vessels, as well sailing vessels as steamers (except dumb-craft), while navigating, or anchored, or moored in the River Humber, or in any part of the River Ouse below the North Eastern Railway bridge crossing the River Ouse at or

(*a*) See London Gazette, 1890, Vol. 1, p. 796.

near Hook, or in any part of the River Trent, at or below Gainsborough, shall observe and obey the "Regulations for Preventing Collisions at Sea," set out in the first schedule annexed to an Order in Council made in pursuance of and for the time being in force under the Merchant Shipping Act Amendment Act, 1862, or any statutory modification thereof, with the exceptions and additions made in the following Rules. Local rules (Humber).

II. All vessels as aforesaid when at anchor in the River Humber, or in any part of the River Ouse below the North Eastern Railway bridge crossing the River Ouse at or near Hook, or in any part of the River Trent at or below Gainsborough, shall, between sunset and sunrise, instead of the light prescribed by Art. 8 of the said Regulations, exhibit from the forestay, or otherwise near the bow of the vessel, where it can best be seen, a white light in a globular lantern of eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light visible all round the horizon at a distance of at least one mile; and in addition thereto, all vessels having two or more masts shall exhibit another white light at double (*a*) the height of the bow light, at the main or mizen peak, or the boom topping lift, or other position near the stern where it can best be seen.

III. Dumb-craft shall, between sunset and sunrise, exhibit in the forepart of the craft a white light behind an opal frosted or ground colourless glass shade, and distinctly visible on all sides, not less in height above deck or above any cargo or other obstruction on the deck:—

(1.) When at anchor, than five feet;

(2.) When being towed, than three feet; and the sternmost of the craft towed shall also exhibit a white light at the stern.

IV. Every passenger ferry steamer plying between Hull and New Holland while under way and in motion shall in all weathers, between sunset and sunrise, carry at the stern a bright white light so constructed as to show an unbroken and uniform light over an arc of the horizon of twelve points of the compass, so fixed as to throw the light from right astern to six points on each side of the ship, and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least one mile.

V. Every dredger moored in the River Humber or off any pier or quay shall, between sunset and sunrise, exhibit at the head a white light in a globular lantern of not less than eight

(*a*) This means not less than double; twenty-five feet from the deck held to comply with the Rule. *The Magneta*, 15 P. D. 101.

Local rules (Humber).

inches in diameter, and a similar light at the stern, and in addition thereto an amber light four feet above each of the said white lights, all the said lights to be so constructed as to show a clear, uniform, and unbroken light, visible at a distance of at least one mile.

VI. Every vessel shall be navigated with care and caution, and at a speed and in a manner which shall not involve risk of collision by causing a swell, or endanger the safety of other vessels or moorings, or cause damage thereto, or to the river banks. Special care and caution shall be used in navigating such vessel where there is much traffic, and when passing vessels employed in dredging or removing sunken vessels or other obstructions. If the safety of any vessel or moorings is endangered, or damage is caused thereto, or to the river banks by a passing steam vessel, the onus shall lie upon the master or owner of such vessel to show that she was navigated with care and caution, and at such a speed and in manner directed by these Rules.

VII. (*Steamships approaching wreck removing craft, or craft laying or removing buoys or drawing moorings, are to go dead slow* 300 *yards before reaching such craft and* 100 *yards after passing them.*)

VIII. Any vessel which, from unavoidable circumstances, may be compelled to anchor in the fairway of the river, shall, with as little delay as may be, remove to a proper roadstead, or otherwise proceed on her course.

IX. In interpreting these Rules the term "dumb-craft" shall include canal boats, mud-barges, and other barges, lighters, vessels "without masts," and vessels without either deck or mast, sloops, keels with their masts lowered, and rafts.

The Rules of 7th March, 1887 (*a*) in connection with which the above rules are to be read, apply (rule 1) to all vessels navigating or anchored or moored in the River Trent between the Stone Bridge at Gainsborough and Trent Fall. Rules 2, 3, limit the number of vessels which may be towed at one time. Rule 4: Every vessel anchoring in the river shall have her anchor buoyed. Rule 5: Vessels anchoring for the purpose of dredging or fishing not to obstruct the navigable channel, nor to lie abreast of each other. Rule 6: Vessels lying at works or wharves and waiting to load or discharge, or anchored for purposes of fishing, to have ropes made fast ashore. Rule 7: No vessel, unless waiting to load or discharge cargo, to lie for more than forty-eight hours in any of the following places:—Mortar Bight, Stockwith or Ropery Bight, Jenny Hurn Bight, Kelfield Upper Bight, lower part of Andrew's Wife's Reach (above Southfield drain), Derrythorpe or Althorpe Bight, Boggard Hall Bight between Burringham Ferry and Keadby Bridge, Keadby Bridge to Keadby Lower Town End, upper part of Amcott's Hook Bight near Amcott's Sluice,

(*a*) London Gazette, 1887, Vol. I., p. 1440.

lower part of Amcott's Hook and Neap Staith. Rules 8, 9: Fishing vessels not to lie in certain places, and not to exceed twenty tons. Rule 10: Any vessel anchored or moored so as to be an obstruction to navigation to be removed within eight hours after delivery of an order of the corporation. Rule 11: No vessel to lie or be moored at any jetty, staith, or landing place, so as to obstruct navigation. Rule 12: All vessels at anchor and not moored to any wharf, staith, jetty, or the river bank to have on board a competent person at all times. Rules 13, 14, provide for buoying and lighting landing-places and steps which are submerged at high water, and for slackening ferry chains when not in actual use. Local rules (Humber).

MERSEY (SEA CHANNELS).

37 & 38 Vict. c. 52.

An Act to make Regulations for Preventing Collisions in Sea Channels leading to the River Mersey.

Whereas it is expedient to make special regulations for preventing collisions between vessels in the sea channels leading to the River Mersey. Mersey (sea channels).

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, as follows:—

§ 1. Any general Regulations for Preventing Collisions at Sea for the time being in force under the provisions of the Merchant Shipping Acts shall be construed as if the following Regulations were added thereto, that is to say—

(1.) Every steamship, and every vessel in tow of any steamship, when navigating in the sea channels or approaches to the River Mersey, between the Rock Lighthouse and the furthest point seawards to which such sea channels or approaches respectively are for the time being buoyed on both sides, shall, whenever it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such steamship or vessel in tow.

(2.) Every ship at anchor in the said sea channels or approaches, within the limits aforesaid, shall carry the single white light prescribed by Art. 7 of the General Regulations (*a*) for Preventing Collisions at Sea, made under the authority of the "Merchant Shipping Amendment Act, 1862," at a height not exceeding twenty feet above the hull, suspended from the forestay, or otherwise near the bow of the ship where it

(*a*) *I.e.*, of 1863.

Local rules (Mersey).

can be best seen; and, in addition to the said light, all ships having two or more masts shall exhibit another similar white light, at double the height of the bow light, at the main or mizzen peak, or at the boom topping lift, or other position near the stern where it can be best seen.

§ 2. This Act shall not come into operation until the first day of November, 1874.

MERSEY, RIVER.

Mersey River.

The following rules were made pursuant to 25 & 26 Vict. c. 63, s. 32, by an Order in Council of the 17th May, 1890:—

Rules concerning the lights or signals to be carried, and concerning the steps for avoiding collision to be taken by vessels navigating the River Mersey (*a*).

1. Every vessel exceeding ten tons measurement, including river craft while navigating, or anchored or moored in any part of the River Mersey, shall from and after the 17th day of May, 1890, observe and obey the "Regulations for Preventing Collisions at Sea," made in pursuance of the Merchant Shipping Act Amendment Act, 1862, and which may from time to time be in force, with the exceptions and additions mentioned in the following rules.

2. Canal flats, and all other vessels without masts, whilst being towed, shall carry the lights prescribed for sailing vessels by Art. 6 of the said "Regulations for Preventing Collisions at Sea."

3. In addition to the lights for a steam vessel towing another vessel prescribed by Art. 4 of the said Regulations, such steam vessel shall carry a bright white light showing astern as a guiding light to the vessel or vessels being towed.

4. Every vessel when at anchor shall carry the white light prescribed by Art. 8 of the said Regulations, at a height not exceeding twenty feet above the hull, suspended from the forestay, or otherwise near the bow where it may best be seen; and in addition to the said light all vessels having two or more masts shall exhibit another similar white light at double the height of the bow light at the main or mizen peak,

(*a*) The Rules of 1866 purported to apply to "the sea channels and approaches" to the Mersey. It appears that ships in these waters are subject to the general Regulations as modified by 37 & 38 Vict. c. 52, *supra*.

or on the boom topping lift, or other position near the stern, where it can be best seen (*b*). Local rules (Mersey).

5. Every vessel, whether over or under ten tons net register, having on board any explosive except ships' ammunition, shall also when at anchor exhibit a red light in a globular lantern, not less than ten inches in diameter, over the forward white light prescribed by Art. 8 of the said Regulations.

6. Instead of the light prescribed by Art. 11 of the said Regulations, a bright white light shall be shown continuously, between sunset and sunrise, in all weathers on board every vessel while under way and in motion. Such light shall be of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least one mile; it shall be so constructed as to show an uniform and unbroken light over an arc of the horizon of twelve points of the compass; and it shall be so fixed as to throw the light right astern and for six points therefrom on each quarter of the vessel (*c*).

7. A vessel anchored to mark the position of a wreck or other obstruction shall carry in all weathers, from sunset to sunrise, two bright white lights in globular lanterns of not less than eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light visible all round the horizon for at least one mile, which lights shall be placed horizontally on a cross yard on the foremast at a height not exceeding twenty feet above the hull, and twenty feet apart. And the said vessel shall carry in all weathers, between sunrise and sunset, two black balls placed as hereinbefore ordered with regard to the lights afore-mentioned.

OUSE, RIVER. (*See* HUMBER, *supra*.)

SOLENT.

By an Order in Council of the 3rd of May, 1882, made under the Solent Navigation Act, 1881, 44 & 45 Vict. c. 219 (Local), certain limits are specified for anchorage ground in the neighbourhood of Cowes and Ryde. Solent.

(*b*) In *The Locksley Hall*, Ad. Div., 28th March, 1887, Butt, J., held that a light on the main halliards forty feet forward of the taffrail complied with a corresponding rule (of 5th January, 1881); there being no peak halliards.

(*c*) The corresponding rule of 5th January, 1881, occasioned the decision in *The Fire Queen*, 12 P. D. 147.

Local rules.

SUEZ CANAL (*a*).

Suez Canal.

The substance of the Regulations for the navigation of the Suez Canal (of 1st July, 1878) is as follows:—The maximum speed is to be five-and-a-half knots. All ships over 100 tons are to take pilots; "but the responsibility as regards the management of the ship devolves solely on the captain"; yards are to be braced forward; jibbooms to be in; and a kedge ready to let go astern; a boat is to be towed astern; watch to be kept by day and night; hands are to be stationed ready to let go hawsers; navigation at night is at the captain's risk.

Ships moored are to show a light forward and another aft; otherwise the usual lights to be carried, except that on the approach of another ship two white lights are to be shown over the side on which the other is to pass; whistles are to be blown on ships approaching and passing; steamships are to stop when the passage is not clear, and to reduce speed when passing craft. "Whenever a collision appears probable, no ship must hesitate to take the ground, and thus avoid collision. The expenses consequent upon a grounding under these circumstances shall be defrayed by the ship in fault." Vessels approaching are to reduce speed and hug the starboard side, if required to do so by the pilot; vessels are not to overtake and pass others, except when necessary, and then only at sidings by the direction of the canal authorities.

SUIR, RIVER (WATERFORD).

Suir, River.

Bye-laws of 28th November, 1887, made under the powers of 25 & 26 Vict. c. 63, s. 32 (*b*), apply to the river Suir from Granagh Castle to the Old Bridge of Carrick, including the tributary streams known as Killoteran or Mount Congreve Pill, Kilmeaden or Phelan's Bridge Pill, Clodagh River or Portlaw Pill, Pouldrew Pill, Pilltown Pill or River, Lingawn River, and Ballylinch Channels. Rule 1: All barges, lighters, and other river craft (except craft moored or at anchor at or opposite to Carrick-on-Suir Quay), "shall between sunset and sunrise, whether at anchor or under way, exhibit in the bows or on the mast an all-round white light of sufficient power to be distinctly visible on a dark night with a clear atmosphere at a distance of at least one mile." Rule 2: The person in charge of any such craft "under way and showing the white light, shall dip said light repeatedly on the approach of any vessel or steamer in sufficient time to prevent a collision." Rule 3: All steam tugs, steam barges, and seagoing vessels (except when moored or at anchor at or opposite to Carrick-on-Suir Quay) to carry and exhibit lights in accordance with the Sea Regulations. Rule 4: Penalty 5*l*.

TEES, RIVER.

Tees, River.

Bye-laws dated the 2nd May, 1887, made under the Tees Conservancy Act and the Harbours, Docks, and Piers Clauses Act, 1847, provide:—(3) owner and master, and also pilot, if any, to be responsible for observance of bye-laws; (5) ships to be moored under direction of harbour master, and

(*a*) See Nautical Magazine, 1878, p. 572; as to compulsory pilotage, see *The Guy Mannering*, 7 P. D. 132.

(*b*) See London Gazette, 1887, Vol. II., p. 6707.

anchors to be buoyed; (6) ships at anchor or moored to have sails furled, yards, davits, bowsprits, &c., to be peaked and rigged in; (7) anchors of ships moored to be inboard clear of gunwale or hanging from hawse pipe; (8) three ships only abreast at staiths, &c.; (9) ships at staiths, &c., not to lay anchor in channel; (10) ships not to lie between tiers; (13) steamships to carry the Regulation lights, except that "in case of a steamship having no foremast it shall be sufficient if the said white light (*the mast-head light*) be at a height not less than twelve feet above the hull, fixed on a staff not more than thirty feet from the stem; and in the case of a steam vessel not exceeding twelve feet in breadth, it shall be sufficient if such light be at a height not less than six feet above the hull, fixed on a staff not more than twelve feet from the stem"; (15) steamship in tow or under sail and not under steam to carry side lights only; (17) a "bright white light" to be shown from the stern of a ship being overtaken; (18) vessels at anchor and also outside vessel of tier to exhibit riding light; (19) open cargo and fishing craft and rafts to use the Regulation lantern with green and red slides; (20) ships to obey harbour-master. As to the navigation of the river, there are the following rules:— Local rules (Tees).

21. Every vessel navigating the river shall keep the starboard side, so that the port-helm may always be applied to clear vessels proceeding in the opposite direction (*a*).

22. Every steam vessel when approaching another vessel on an opposite course or from an opposite direction shall, before approaching within 100 yards, slacken her speed, and keep as near as possible to the starboard side of the river, so as to afford the greatest facility for passing the approaching vessel (*b*).

23. Every steam or other vessel (and whether being towed or towing another vessel) must so approach the river from sea as to enter on that side of the channel reserved for their navigation.

24. All vessels when under way, requiring to pass over a part of the channel which is not within that portion reserved for their navigation, for the purpose of proceeding to or from landings, moorings, or other places, must take upon themselves the responsibility of doing so in safety with reference to the passing traffic; and any vessel continuing its navigation after reaching such landing, mooring, or other place, must again proceed to the side of the river specified as the proper side for its navigation, so soon as practicable, and take upon itself the responsibility of doing so in safety, with respect to the passing traffic.

25. Vessels crossing the river, and vessels turning, must take upon themselves the responsibility of doing so safely with reference to the passing traffic (*b*).

(*a*) This does not mean that the vessel crossing the river is to be liable whatever the fault of the other may be. *The Thetford*, Ad. Div. 21st May, 1887.

(*b*) These Rules apply whenever two vessels navigating at all near the centre of the river are approaching one another, even though in such positions as to show one

Local rules (Tees).

26. No steam vessel shall at any time be navigated in any part of the river at a higher rate of speed than a maximum rate of seven statute miles per hour over the ground (*c*).

27. Whenever there is a fog, no steam vessel shall be navigated in any part of the river at a higher rate of speed than three miles per hour.

28. When steam vessels are proceeding in the same direction, but with unequal speed, the vessel which steams slowest shall, when overtaken, keep sufficiently to that bank of the river which is on her own starboard side, and shall offer no obstruction whatever, by crossing the channel or otherwise, to the free passage of the faster vessel, and shall ease and, if necessary, stop the engine as soon as a faster vessel comes within 100 yards, and in like manner the faster vessel shall ease its engine when it comes within 100 yards of the slower vessel, until it has passed the vessel so overtaken; and, that ignorance of the approach of the faster vessel may not be pleaded by the master of the slower vessel, it shall be sufficient intimation of such approach if the steam-whistle of the faster vessel be three times sounded; but no vessel overtaking any other vessel will be justified in passing such vessel at any of the points or turnings of the river, or at any dock entrance.

29. Every steam vessel other than a steam vessel employed in towing, meeting, or overtaking any sailing vessel or steam tug with sailing vessels in tow, shall ease its engines before arriving within 100 yards of, and until it shall have passed, the sailing vessel or steam tug and trains. Every steam tug and train, when meeting another vessel, shall, in proper time, put their helms to port, and, when overtaken, shall keep sufficiently to the proper side of the river to allow the vessel overtaking them to pass.

30. All vessels towing in from sea with a long scope of towline must shorten the same on getting inside the river, and before reaching the Eston Wharf. The tow-line, when so shortened, must not exceed twenty-five fathoms in length.

31. Every steam tug or other steam vessel towing a vessel into the port which shall not already have a pilot on board, and whether showing a signal for a pilot or not, shall be bound to ease, or stop if necessary, to enable a pilot to board the vessel, unless the master thereof shall have previously

another their green lights. Unless there is extreme necessity, they must both of them port. *The Mary Lohden*, 6 Asp. M. C. 262, decided under the corresponding Rules 17 and 18 of 1870.

(*c*) An earlier rule, which did not state whether the speed was over the ground or through the water, occasioned the decision in *The R. L. Alston*, 8 P. D. 5.

informed the master of the steam vessel that he did not intend to take a pilot. Local rules (Tees).

32. No vessel shall be allowed to drift in any part of the river or harbour. Every vessel must be properly navigated, or moored clear of the navigable channel. Vessels proceeding to any dock, and arriving off the entrance of such dock before the signal for admission is hoisted, must keep on either side of the navigable channel, and out of the fairway of the river or dock traffic, until the signal is hoisted for their reception.

33. No steam tug or other steam vessel shall tow two or more vessels alongside each other, nor shall tow more than one raft of timber when such rafts exceed 150 feet in length or thirty feet in breadth.

34. A steam vessel shall not tow at one time more than six keels, wherries, or other boats.

35. (*Vessels to be properly manned.*)

36. Every steam vessel having any vessel or vessels in tow shall attend upon the vessel or vessels in tow until such vessel or vessels is or are properly moored or secured.

* * * * *

42. (*Vessels likely to be damaged by surge of passing craft may show red flag or red light; thereupon passing steam vessels to go dead slow whilst within* 100 *yards of the signal.*)

43. No steam vessel shall go more than a speed of six statute miles per hour over the ground in that part of the river Tees between the Commissioners' Graving Dock and Bamlett's Bight; nor at a greater speed than five statute miles per hour over the ground between Bamlett's Bight and Stockton Bridge.

44. (*Steamships' engines to be stopped when within fifty yards of small boats coming alongside.*)

45. (*Vessels approaching landing steps to ring bell or sound whistle.*)

THAMES.

Rules and bye-laws for the navigation of the River Thames, made under the Thames Conservancy Acts, 1857 and 1864, the Thames Navigation Act, 1866, the Thames Conservancy Act, 1867, and the Thames Navigation Act, 1870, and approved by Order in Council of February 5th, 1872, provide (3—13) for the mooring and berthing of vessels at the tiers and public moorings (*d*); (14) vessels in certain parts of the river are to navigate singly; 15 is as follows:— Thames.

15. All vessels navigating Gravesend Reach are to keep to the northward of a line defined by a skeleton beacon erected

(*d*) In spite of these rules a vessel overtaken by dense fog is justified in anchoring in the fairway of the river, but it is then her duty to move as soon as she reasonably can. *The Aguadillana*, 6 Asp. M. C. 390.

Local rules (Thames).

upon the India Arms Wharf on with the high chimney of the Cement Works at Northfleet; and all vessels intending to anchor in the Reach are to bring up to the southward of that line. A lantern is placed on the above beacon which shows (at night) a bright light to the northward of the same line, and a red light to the southward of it, over the anchorage ground (*e*). All vessels so anchoring and remaining beyond a period of twenty-four hours are to be moored.

Barges are to be sufficiently manned (16) (*f*); anchors are to be buoyed; they may not be laid in the fairway, or carried a-cock-bill (17—20) (*g*); there are various regulations as to vessels lying at the tiers and their moorings (21—27); 28 provides that vessels are to be navigated with due care for the safety of others; engines are not to be moved when at moorings (31); the master of every steamship is required to remain on the paddle-box when under way (36); barges are to have fifteen inches free board to the top of their coamings (41). The rules as to navigation and ships' lights are as follows:—

(The following was approved by Order in Council of 17th March, 1875.)

3. The person in charge of the sternmost or last of a line of barges, when being towed, shall exhibit, between sunset and sunrise, a white light from the stern of his barge.

(The following were approved by Order in Council of 11th July, 1877.)

2. All vessels navigating the river between the Albert Bridge, at Chelsea, and Charlton Pier, shall be navigated singly and separately, except small boats fastened together, or towed alongside or astern of other vessels, and except vessels towed by steam.

3. Vessels towed by steam shall be placed two abreast, if more than four in number, and not more than six shall be towed together at one time.

4. Above and to the westward of the Albert Bridge, at

(*e*) A vessel to the southward of this line, and moving from buoy to buoy for the purposes of bringing up at the first one that is vacant, is not "navigating Gravesend Reach" in breach of this rule. *The City of Delhi*, 6 Asp. M. C. 269.

(*f*) Barges above fifty tons burthen are required to have two licensed lightermen on board. *Perkins* v. *Gingell*, 50 J. P. 277.

(*g*) It has been held that the words, in Rule (20), stock awash, do not mean that the stock may not be under water. *The Orwell*, Ad. Div. May, 1887. A vessel made fast to another, and having her anchor stock out of the water in breach of this rule, was held responsible for the damages caused by her anchor to a barge which collided with her in a fog. *The Rose of England*, 6 Asp. M. C. 304. Again, a vessel which, after moving from buoy to buoy in the anchorage ground in Gravesend Reach, and finding them all occupied, gets her anchor a-cock-bill for the purpose of coming to anchor, does not do so before it is "absolutely necessary," and therefore does not infringe Rule 19. *The City of Delhi*, 6 Asp. M. C. 269 (*supra*).

Chelsea, six vessels and no more may be towed together in a single line, at one time, and the distance between any two of the vessels, so towed, shall not exceed fifty feet. Local rules (Thames.)

(The following rules made under the above Acts were approved by Order in Council of 18th March, 1880. The marginal notes which appear in the published copies of the Rules are not contained in the Order in Council, and are, therefore, omitted below.)

The word "vessel" shall mean any ship, lighter, barge, boat, wherry, punt, canoe, and any kind of craft whatever, whether navigated by steam or otherwise.

The word "river" shall mean that part of the River Thames which is within the jurisdiction of the Conservators between Cricklade, in the county of Wilts, and Yantlet Creek, in the county of Kent.

1. In obeying and construing the following rules due regard shall be had to all dangers of navigation, and to any special circumstances which may render a departure from the rules necessary in order to avoid immediate danger.

2. Nothing in the following rules shall exonerate any vessel, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Bye-Law for the Regulation of the Navigation of the River.

3. Every steam vessel navigating the river shall be navigated with care and caution, and at a speed and in a manner which shall not endanger the safety of other vessels or moorings, or cause damage thereto, or to the banks of the river. Special care and caution shall be used in navigating such steam vessels when passing vessels employed in dredging or removing sunken vessels or other obstructions.

If the safety of any vessel or moorings is endangered, or damage is caused thereto or to the banks of the river by a passing steam vessel, the onus shall lie upon the owner of such steam vessel to show that she was navigated with care and caution, at such speed and in such manner as directed by this rule.

Bye-Laws and Rules for the Regulation of the Navigation of the River between Yantlet Creek and Teddington Lock.

Rules concerning Lights.

4. The lights mentioned in the following rules, numbered 5 to 10, and no others, shall be carried in all weathers from sunset to sunrise.

Local rules (Thames).

5. A steam vessel when under way shall carry—

(a) On or before the foremast, or if there be no foremast on a staff at the forepart of the vessel at a height above the hull of not less than twenty feet, and if the breadth of the vessel exceeds twenty feet then at a height above the hull not less than such breadth, a bright white light, so constructed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel—viz., from right ahead to two points abaft the beam on either side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles. Provided that steam vessels which navigate both above and below London Bridge shall not be required to carry their lights at a greater height than twelve feet above the hull.

Steam vessels navigating only above London Bridge may carry the white light at any convenient height above the stem.

(b) On the starboard side, a green light so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side; and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least one mile.

(c) On the port side, a red light so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side; and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least one mile.

(d) The said green and red side lights shall be fitted in such a manner as to prevent these lights from being seen across the bow.

(e) A steam vessel when towing another vessel shall, in addition to her side lights, carry two bright white lights in a vertical line one over the other, not less than four feet apart. Each of these lights shall be of the same construction and character, and shall be carried in the same position as the white light which other steam vessels are required to carry.

(f) A steam vessel towing may also carry a light showing astern as a guiding light to the vessel or vessels

towed, but this light must be so screened as not to be visible further forward than four points abaft her beam. Local rules (Thames).

6. A sailing vessel under way, or being towed, shall only carry the side lights provided by (b) and (c) of Rule 5 for a steam vessel under way (*a*).

7. A steam vessel, a sailing vessel, or a barge when at anchor in the river, shall carry where it can best be seen, at a height not exceeding twenty feet above the hull, a white light, in a globular lantern of not less than eight inches in diameter, and so constructed as to show a clear, uniform and unbroken light, visible all round the horizon, at a distance of at least one mile; provided always that where masted vessels are lying in tiers, the outermost off-shore masted vessels only of each tier shall each carry a light similar to that required for vessels at anchor; but barges lying at the usual barge-moorings in the river above Barking Creek shall not be required to exhibit such riding light.

8. A vessel which is being overtaken by another vessel below Barking Creek shall show from her stern to such last-mentioned vessel a white light, or a flare-up light.

This rule shall not apply to boats, wherries, punts, or canoes.

9. All vessels when employed to mark the positions of wrecks or other obstructions, shall exhibit two bright lights placed horizontally not less than six nor more than twelve feet apart.

10. Every steam dredger moored in the river shall, between sunset and sunrise, exhibit three bright lights from globular lanterns of not less than eight inches in diameter, the said three lights to be placed in a triangular form, and to be of sufficient power to be distinctly visible with a clear atmosphere, on a dark night, at a distance of at least one mile, and to be placed not less than six feet apart on the highest part of the framework athwart ships.

Rules concerning Fog, &c. Signals.

11. All vessels entering or being overtaken by a fog shall be navigated with the greatest caution, and at a very moderate speed.

12. Every steam vessel navigating the river shall be provided with a steam whistle or other efficient steam sound signal, so placed that the sound may not be intercepted by

(*a*) A sailing barge with her mast lowered dredging stern foremost, assisted by her anchor ahead, is not required by this rule to carry her side lights: *The Indian Chief*, 14 P. D. 24.

Local rules (Thames).

any obstruction, and also with an efficient bell. Every sailing vessel navigating the river shall be provided with an efficient fog-horn, and also with an efficient bell.

13. In fog, whether by day or night, the signals described in this Rule shall be used, that is to say:

(a) A steam vessel under way shall make with her steam-whistle, or other steam sound signal, at intervals of not more than two minutes, a prolonged blast.

(b) A sailing vessel under way shall sound her fog-horn, at intervals of not more than two minutes.

(c) All steam vessels and all sailing vessels when in the fairway of the river, and not under way, shall at intervals of not more than two minutes ring the bell.

Rules as to Speed and Mode of Navigation.

14. Every steam vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed, and shall stop and reverse if necessary.

15. Steam vessels navigating the river between Barking Creek and London Bridge, other than river passenger steamers certified to carry passengers in smooth water only, shall never exceed a speed of seven statute miles per hour over the ground, whether with or against the tide.

16. Every sailing vessel or steam vessel, overtaking any other vessel, shall keep out of the way of the overtaken vessel, which latter vessel shall keep her course.

The following Rules were approved by Order in Council of 27th December, 1887, and apply between Yantlet Creek and Teddington:—

Steam-whistle Signals.

17. When two steam vessels are in sight of one another, and are approaching, with risk of collision, the following steam signals shall be intimations of the course they intend to take:—

(a.) One short blast of the steam-whistle of about three seconds' duration to mean "I am directing my course to starboard, and intend to pass you port side to port side." The use of this signal shall be optional.

(b.) Two short blasts of the steam-whistle, each of about three seconds' duration, to mean "I am directing my course to port, and intend to pass you starboard side to starboard side."

The latter signal shall not be used in the case provided by Rule (22) where that rule can be obeyed;

but it shall be compulsory to use this signal when a departure from that rule is necessary to avoid immediate danger. Local rules (Thames).

(c.) Three short blasts of the steam whistle, each of about three seconds' duration, shall mean "I am reversing my engines."

18. When a steam vessel is turning round, or for any reason is not under command and cannot get out of the way of an approaching vessel (or when it is unsafe or impracticable for a steam vessel to keep out of the way of a sailing vessel,) she shall signify the same by four or more blasts of the steam whistle in rapid succession, the blasts to be of about three seconds' duration.

19. The signals by whistle mentioned in the preceding rules shall not be used on any occasion or for any purpose except those mentioned in the rules; and no other signal by whistle shall be made by any steam vessel unless it be by a prolonged blast of not less than five seconds' duration.

19A. Vessels coming out of dock shall signify the same by a prolonged blast of the steam whistle of not less than five seconds' duration; and in cases where a vessel is not under steam, the tug boat in attendance shall make the same signal; and no other steam whistle signal shall be made by vessels coming out of dock.

The following are a continuation of the Rules of 18th March, 1880:—

Bye-laws and Rules Regulating the Navigation of the River Thames between Yantlet Creek and a line drawn from Blackwall Point to Bow Creek.

Steering and Sailing Rules.

20. When two sailing vessels are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other, as follows, viz.:—

(a.) A vessel which is running free shall keep out of the way of a vessel which is close-hauled.

(b.) A vessel which is close-hauled on the port tack shall keep out of the way of a vessel which is close-hauled on the starboard tack.

(c.) When both are running free with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other.

(d.) When both are running free with the wind on the same side, the vessel which is to windward shall keep out of the way of the vessel which is to leeward.

(e.) A vessel which has the wind aft shall keep out of the way of the other vessel.

Local rules (Thames).

21. If a sailing vessel and a steam vessel are proceeding in such a direction as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel.

If owing to causes beyond the control of those navigating the steam vessel it is unsafe or impracticable for the steam vessel to keep out of the way of the sailing vessel, she shall signify the same to the sailing vessel by four or more blasts of the steam-whistle in rapid succession, as mentioned in Rule (18); the sailing vessel shall then keep out of the way (*g*).

22. When two steam vessels proceeding in opposite directions, the one up and the other down the river, are approaching one another so as to involve risk of collision, they shall pass one another port side to port side (*h*).

23. Steam vessels navigating against the tide, shall, before rounding the following points, viz., Coalhouse Point, Tilburyness, Broadness, Stoneness, Crayfordness, Cold Harbour Point, Jenningtree Point, Halfway-house Point or Crossness, Margaretness or Tripcock Point, Bull Point or Gallionsness, Hookness, and Blackwall Point, ease their engines and wait until any other vessels rounding the point with the tide have passed clear (*h*).

24. Steam vessels crossing from one side of the river towards the other side, shall keep out of the way of vessels navigating up and down the river (*h*).

25. Where by the above Rules one of two vessels is to keep out of the way, the other shall keep her course (*i*).

Bye-laws and Rules Regulating the Navigation of the River above Teddington.

26. When two steam vessels proceeding in opposite directions, the one up and the other down the river, are approaching one another so as to involve risk of collision, they shall pass one another port side to port side.

(*g*) In *The Long Newton* (6 Asp. M. C. 302), a sailing barge was found in fault for disregarding a steamer's signal given under this rule. The steamer's difficulties were created by causes beyond her control. It was not decided whether, if this had not been the case, the barge would necessarily have been in fault for taking no step: but Sir James Hannen expressed the opinion that in any case the prudent course for a sailing ship would be to act at once upon hearing the signal.

(*h*) See the cases below, pp. 585—589, as to these Rules.

(*i*) In *The Skerryvore* (Ad. Div. 19th Aug. 1886), Sir J. Hannen said that "keep her course" did not mean, in the case of a vessel rounding a point, that she was necessarily to keep at the same distance from either shore. If there were a "clear eye" elsewhere, she was at liberty to approach either shore to avail herself of it. See also, as to this rule, *The Schwann*, 6 Asp. M. C. 409, and *The River Derwent*, 6 Asp. M. C. 467 (*infra*, p. 589).

27. Steam vessels navigating against the stream shall ease, and, if necessary, stop, to allow vessels coming down with the stream to pass clear. Local rules (Thames).

The following Rules were made by Order in Council of 18th March, 1888:—

1, 2 and 3. (*Title of rules: "steam vessel" to include any vessel propelled by machinery, and whether registered as a steam launch or not; repeal of rule* 28 *of the Rules of* 18*th March,* 1880.)

4. Every steam vessel shall, when navigating in or above Teddington lock after sunset and before sunrise, carry and exhibit the following lights and no other or others, that is to say:—

(a) On or before the foremast, or if there be no foremast on the funnel or on a staff at the bow, and in either case at a height above the hull of not less than four feet, a bright white light so fixed as to throw the light ten points on each side of the vessel, viz., from right ahead to two points abaft the beam on either side, which said light shall in case of a vessel registered under the provisions of the said Thames Act, 1883, as a steam launch, be behind a glass shade or slide, upon which the registered numbers of such vessel shall be legibly and conspicuously painted in black figures, and in case of any other vessel with the glass perfectly plain and clear.

(b) On the starboard side a green light so fixed as to throw the light from right ahead to two points abaft the beam.

(c) On the port side a red light so fixed as to throw the light from right ahead to two points abaft the beam.

5. Every such light shall be of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least one mile.

6. The person in charge of such vessel shall be responsible for the due carrying and exhibiting of such lights and no other light or lights.

7. (*Penalty*, 5*l.*)

Regulations as to Watermen, Lighters, Tugs, &c.

By sect. 80 of 22 & 23 Vict. c. 133 (Local), amended by 27 & 28 Vict. c. 113, the master, wardens, and assistants of the company of watermen and lightermen of the River Thames are empowered, subject to the approval of the Thames Conservators, to make bye-laws "for carrying into effect the purposes of the Act," including, *inter alia*, the making of "proper regulations for the navigation of barges, lighters, boats, and other like craft . . . for the security of passengers . . . and for the orderly conduct of traffic." (See the preamble.) Bye-laws dated the 26th of

Local rules (Thames).

June, 1860, the 27th of December, 1864, and the 1st of January, 1867, have been made under this section (*k*). The operation of the Act (see sect. 8) and bye-laws extends to all parts of the river between Teddington Lock and Lower Hope Point, near Gravesend. The bye-laws of 1860 contain provisions relating to navigation. The following is a summary of the more important of these:—

Rule 51 imposes a maximum penalty of 2*l.* on persons wilfully casting off craft and letting it drive. Rule 52 requires the person having charge or the owners of any steamboat or other vessel or craft sunk in the river to affix some notice during daylight, and a light from sunrise to sunset, and also to send notice to the Thames Conservators, or the nearest harbour master's office. Penalty 5*l.*, in addition to liability to action for damage. Rules 53 and 54 regulate the times of lighters loading or unloading. Rule 55 imposes a penalty, not exceeding 3*l.*, upon any person, who being employed, *inter alia*, to navigate any vessel from or to any ship or place in the river, unskilfully or negligently carries out such employment whereby loss or injury to life, or to any craft or goods may arise, or refuses or neglects to fulfil his engagement without reasonable notice. The same rule imposes a penalty, not exceeding 5*l.*, on any person navigating craft who, *inter alia*, leaves such craft without some authorised person on board, or without having properly moored and secured the same, or who does any wilful damage to any vessel in the river. Rules 57, 58, and 59 impose penalties not exceeding 2*l.* on persons who, between Vauxhall Bridge and the entrance to the Victoria Docks, (1) navigate any craft (except steamboats) exceeding the burthen of ten tons, and at the same time navigate or have attached thereto any other craft exceeding the burthen of ten tons; (2) navigate, row, or tow timber in a float or floats, which shall exceed sixty feet in length and twenty feet in width, or do not keep the headmost part of such timber at least ten yards distant or astern of any other timber or craft going in the same direction; (3) navigate any steamboat and at the same time tow more than six barges, lighters, or other craft exceeding ten tons each attached thereto, or tow barges, lighters, or other craft which are not well and sufficiently attached and fastened to such steamboat and to each other, so that any of them go adrift (*l*). Rule 60 requires steam-tugs and their tows to have licensed persons on board for their navigation (*m*). Rule 88 imposes a penalty not exceeding 1*l.* on persons obstructing craft passing to or from public stairs or causeways. Rule 90 requires persons rowing or navigating any boat, barge, or vessel with the tide to warn at a reasonable distance all persons rowing across or against the tide, under a penalty not exceeding 2*l.* Rule 98 imposes a penalty not exceeding 5*l.* on un-

(*k*) The writer is indebted to the courtesy of Messrs. J. A. and H. E. Farnfield for access to these Acts and bye-laws.

(*l*) It was recently held (*Rolles* v. *Newell*, 25 Q. B. D. 335) that a tug engaged in hauling into dock thirty-one barges at once, each exceeding ten tons burthen, and which had been collected immediately outside the dock gates, was not being navigated in the river within the meaning of this rule (59); and the opinion was expressed, though the point was not fully argued, that these bye-laws have no operation within the jurisdiction of the dock-master of the Victoria Docks. (See sect. 100 of the local Act.)

(*m*) See *Elmore* v. *Hunter*, 3 C. P. D. 116, as to the construction of this rule, and of sect. 66 of the local Act. See also 27 & 28 Vict. c. 113, ss. 59, 62, and 63. Cp. *Perkins* v. *Gingell*, 50 J. P. 277, and *Goldsmith* v. *Slattery*, 63 L. T. N. S. 273, decided on r. 35, read with r. 16 of the Thames Rules, 1872, *supra*, p. 580.

licensed persons navigating steam or sailing boats whose voyages commence and terminate within the limits, and provides for recording convictions on the licences of persons whose negligence, unskilfulness, or misbehaviour has occasioned loss of life or damage to person or property. Rules 99, 100, impose penalties not exceeding *5l.* on masters and persons in command of steamboats navigated as last aforesaid, who do not remain on the bridges or paddle-boxes, or who permit persons other than the crew to remain there, or do not cause a proper look-out to be kept from the bow, or take on board or put out passengers whilst the engines are in motion. Rule 101 requires all vessels to be navigated in a careful and proper manner, with regard to their own safety and that of other vessels, and imposes a penalty not exceeding *5l.* on masters and persons in command who navigate at a dangerous rate of speed, or in a negligent manner, or who, when approaching or leaving any vessel that is in danger of sinking, or is employed in raising sunken craft, do not, on being hailed to do so, reduce their rate of speed. Local rules (Thames).

Decisions upon the Thames Rules, 22, 23, & 24 of 1880.

There have been the following decisions upon these Rules:—

In *The Odessa* (*n*) it was held that Rule 22 of the Thames Rules is not to be interpreted in the same way as Art. 15 (the "end-on" Rule) of the General Regulations. Two vessels proceeding, one up and one down the river, may be within Rule 22 of the Thames Rules without being end on or nearly end on within the meaning of Art. 15 of the General Regulations. The application of Rule 22 is determined by the circumstances of the case; it applies whenever, as must generally be the case, there is risk of collision to two vessels approaching each other and proceeding the one up and the other down the river, but not when there is no such risk (*o*). Thames rule, No. 22. *The Odessa.*

But, for the rule to apply, they must both be under way. Thus the rule would not apply to a vessel lying under a point or without any way upon her (*p*).

The Libra (*q*) is an important decision upon the 22nd and 23rd of the Thames Rules. *The Libra*, an outward-bound steamship, saw the masthead light of *The Joseph Ricketts*, a steamship, coming up the river with the flood tide over Tilburyness, one of the points specified in Rule 22, and requiring for an outward-bound ship the starboard helm. The vessels were then at such a distance apart that Rule 23 applied, *The Libra* being so far from the north shore that *The Ricketts* might have passed between her and the north shore, port side to port side. *The Ricketts* ported to round the point, and then Rules 22 & 23. *The Libra.* 23

(*n*) 4 Asp. Mar. Law Cas. 493; followed in *The Berrington* and *The Ostrich*, Ad. Div. 9th March, 1883.

(*o*) *The Lady Wodehouse*, 2 T. L. R. 252.

(*p*) *The Altyre*, Ad. Div. 27th Feb. 1885.

(*q*) 6 P. D. 139.

Local rules (Thames). *The Libra.*

steadied her helm, intending to pass *The Libra* port side to port side. *The Libra* then starboarded, and showed her green light to *The Ricketts*. After seeing *The Ricketts'* masthead light, *The Libra* saw the green light of *The Ricketts*, and then her red. When the red appeared the helm of *The Libra* was put to starboard, and her engines put full speed astern. *The Ricketts*, with her stem, struck the starboard side of *The Libra* forward of amidships. It was held by Sir R. Phillimore that *The Libra* was in fault for starboarding, and breaking Rule 22. In the Court of Appeal it was contended that wherever Rule 23 applies Rule 22 does not. It was held that the rules were not to be so construed; that if a vessel in or about mid-channel going down the river is approaching another on the opposite side of one of the specified points coming up, so that there is risk of collision, both rules were applicable, and must be obeyed. ". . . . It is argued that the rules are so inconsistent, that whenever the 23rd applies the 22nd cannot. I do not think that that is the right construction of the rules. I think that the intention of the 23rd rule is, that when vessels are approaching the points named the state of things should not arise which would make the 22nd rule applicable; but, nevertheless, if that state of things does arise, there is nothing in the 23rd rule which prevents the 22nd rule, under the circumstances, from applying" (*r*). And again (p. 146):—"They may be approaching so as to involve risk of collision, and then their duty is to pass port side to port side; and, therefore, it is not true that whenever the 23rd rule applies the 22nd does not. Neither is the converse true. The truth is, they are independent rules, and that it depends on circumstances whether the 22nd rule applies after the 23rd rule has been applied, or not."

It was contended in the same case that the true construction of the words in Rule 23 as to waiting until other ships pass clear is that the vessel navigating against the tide shall wait in the slack water under the point. This, said Brett, L. J., is not the true meaning of the rule:—"All that the 23rd Rule says is that when it is likely they (the ships) may meet on the point, the vessel which is going against the tide shall wait. I think the meaning of that is, that she shall so far check her speed as to prevent her coming up to the point at the same time when the other vessel would come there."

As to the meaning of the words in Rule 23, "until any other vessels rounding the point with the tide have passed clear," Brett, L. J., and Cotton, L. J., differed. The former

(*r*) *Per* Brett, L. J., 6 P. D. 139, 145; and see *The Margaret*, 9 P. D. 47, 50.

thought they meant clear of each other, the latter clear of the point. Local rules (Thames).

The effect of Rule 23 of the Thames Rules was again discussed in *The Margaret*. The steamship *Clan Sinclair*, of 1,911 tons nett, and 355 feet in length, came out of the South West India Dock, which is on the north side of the Thames, about where the curve round Blackwall Point, which is on the south side, begins, and prepared to navigate down the river against a flood tide with the assistance of a tug. She appears to have been about mid-channel when *The Margaret*, a small steamship, was seen coming up about a third of a mile off, just going to round Blackwall Point. The engines of *The Clan Sinclair*, which were then going easy, were stopped and reversed, and the tug cast off. *The Margaret* struck *The Clan Sinclair* on her starboard side. It was contended that *The Clan Sinclair* was in fault for breaking the 23rd of the Thames Rules. It was held by Butt, J., that the Rule contemplates two vessels in different reaches sighting each other across the point, or at any rate at a time when each is in a different reach. In such circumstances, and when it is likely that the ships will meet "on" the point, the Rule, as explained by Brett, L. J., in *The Libra* (*s*), requires the vessel navigating against the tide to wait until the other has passed clear of her. Accepting this interpretation of the Rule the learned judge held that *The Clan Sinclair* and *The Margaret* never were in the position to which the Rule applies. This decision as to the construction of Rule 23 was reversed on appeal (*t*). The Court of Appeal held that the Rule applies where one vessel is on or off the point when she first sees the other; and that *The Libra* is not an authority to the contrary. Her duty when in such a position under Rule 23 is "to remain as nearly as she can in the same place with respect to her course up and down the river" (*u*). The "point" mentioned in the Rule was defined to be not merely the apex or pitch of the point; it "begins where the vessel, whether proceeding up or down, and having to go round, would, if nothing were in the way, have to use its steerage power for the purpose of continuing in a proper course, and it ends where the necessity for using that power ceases." Rule 23. *The Margaret*.

The words "before rounding" were construed in a similar sense, referring to the time during which she is under the action of her helm by reason of the point.

The Margaret was taken to the House of Lords, where the decision of the Court of Appeal was reversed and that of Butt, J., restored (*x*). The decision of the House of Lords

(*s*) 6 P. D. 139, 145.
(*t*) 9 P. D. 47.
(*u*) *Per* Brett, M.R., 9 P. D. 49.
(*x*) 9 App. Cas. 873.

Local rules (Thames). Rule 23.

proceeded upon the ground that, even assuming that the construction placed upon Rule 23 by the Court of Appeal was correct, and that *The Clan Sinclair* had transgressed the rule, yet since the transgression of the rule did not contribute to the collision, and since *The Margaret* could by ordinary care have avoided the collision, she (*The Margaret*) was alone in fault. In the House of Lords a point was raised as to the application of Rule 23 which had not been raised in either of the Courts below. It was contended that the heading which precedes Rule 17 of the Thames Rules limits the application of Rule 23 to that part of the river which lies between Blackwall Point and Yantlet Creek; and that, *The Clan Sinclair* being at the time of the collision above Blackwall Point, the rule did not apply to her. The contention of the appellants upon this point was not upheld. Rule 23, therefore, applies to a vessel about to round Blackwall Point on her outward voyage, though she is above (to northward and westward of) a line drawn from the Point to Bow Creek.

As to the true construction of Rule 23, the Lords (Lords Blackburn, Watson and Fitzgerald) gave no decision. Lord Blackburn dissented from the opinion expressed by Butt, J., that "the meaning of the rule was that the vessels which were in the straight, or nearly straight, reach, before they began to turn at all, were to wait there until all vessels that might be seen across the land coming in the opposite direction had passed." The effect of that would, he thought, be very inconvenient and hamper the navigation of the river very much. The fair meaning of the rule was, he suggested, "that you begin to round when there is so much curving and rounding of the river that the vessels going down the river begin to turn round the land; they then begin to round, and when they have come so far down that the curving of the river ceases and they go straight, they then cease to round." He considered that the mouth of the South-West India Dock is above the place at which Rule 23 begins to apply.

The direction in Rule 23 to ease and wait is a question of degree. It does not mean that the ship's way is to be stopped to the extent of losing control over her (*y*); it means that she shall proceed at a slower pace than ordinary for the purpose mentioned in the rule (*z*).

Rule 24.

The effect of Rule 24 has been recently discussed in two cases. In *The Schwann* (*a*) it was held by Butt, J., to apply to a vessel, which having been at anchor with her head down

(*y*) *Per* Lord Blackburn, 9 App. Cas. 880.

(*z*) *Per* Lord Watson, *ibid.* p. 885.

(*a*) 6 Asp. M. C. 409.

the river, was getting under way and turning with her head athwart the tide for the purpose of pursuing her voyage up river on the flood tide. In *The River Derwent* (*b*) it was held by the Court of Appeal, that a vessel which had been proceeding up river on a flood tide, and on the south side of mid-channel, and was turning across the river with her anchor dredging for the purpose of getting head to tide did not cease to be a crossing ship so long as she was moving towards the north shore. In the opinion of the majority of the Court (Lindley and Lopes, L.JJ., agreeing with the Nautical Assessors) a vessel becomes "a crossed ship" as soon as she is as far across the river as she can go in safety, even though she is still angling athwart the stream; but Lord Esher, M. R., expressed a contrary opinion on this point. When Rule 24 becomes applicable to a vessel, Rule 25 becomes applicable to vessels approaching her up or down river (*c*). Local rules (Thames). Rules 24, 25.

The decisions in *The Orwell*, *The Ostrich*, *The Indian Chief*, *The Aguadillana*, *Perkins* v. *Gingell*, *Goldsmith* v. *Slattery*, *The City of Delhi*, *The Rose of England*, *The Long Newton*, *Rolles* v. *Newell*, *Elmore* v. *Hunter*, and *The Skerryvore* are noted above in connection with the rules to which they relate.

TRENT. (*See* HUMBER.)

TYNE.

The river Tyne bye-laws of 15th November, 1884, are made under the River Tyne Improvement Acts, and the Acts incorporated therewith. (See the Tyne Improvement Acts of 1850, 1852, 1857, 1859, 1861, 1865, and 1877; the Harbours, Docks, and Piers Clauses Act, 1847.) They provide for (5) the mooring of vessels under the harbour-master's orders; anchors not to be let go; (6) dismantling; (7) anchors to be on deck or hung from hawse-pipe; (9) one vessel only to lie at a staith; (10) vessels not to lie between tiers; (11) steamers moored not to move engines. The rule as to steamships' lights (12) is the same as Art. 3 of the Sea Regulations, except as to steamships without foremast, which may carry the masthead light on a staff, as in the Tees Rules (*supra*, p. 572); (13) steamships towing to carry a second light on the foremast or staff; (14) steamships and sailing ships being towed and steamships under sail to carry side lights only; (15) stern light to be shown to overtaking ship; (16) vessels at anchor, outside vessel of tier, and any other vessel (Tyne).

(*b*) 6 Asp. M. C. 467. (*c*) See the cases last cited.

Local rules (Tyne).

so ordered by harbour master, to show riding light; rafts and open boats to show either red and green side lights, or lantern with red and green slide; (18) fog signals, as in the Sea Regulations.

As to Navigation.

19. Every vessel under way shall, when proceeding seaward, be kept to the south of mid-channel, and when proceeding inward from sea or up the river, to the north of mid-channel, and so that in either case such vessel shall, with a port helm, always be and be kept clear of any vessel proceeding in the opposite direction.

20. Every steam or other vessel (whether towing any other vessel or not, or being towed) shall, unless prevented by stress of weather, be brought into port to the north of mid-channel, and be taken out of port to the south of mid-channel (*d*), (*e*).

21. (*Vessel necessarily on wrong side of river not to obstruct other vessels; to cross to right side as soon as possible* (*e*).)

22. (*Vessel crossing or turning in the river not to cause obstruction* (*e*).)

23. When steam vessels proceeding in opposite directions are approaching each other they shall be kept on their proper sides, and, if necessary, speed shall be slackened, the vessel going against the tide in all cases giving way to the one going with the tide; and when steam vessels are approaching each other so as to involve risk of collision, their helms shall be put to port, and, if necessary, their engines shall be stopped or reversed.

24. When any steam vessel (except a steam vessel when towing sailing vessels) is approaching any sailing vessel or steam-tug with sailing vessels in tow proceeding in the opposite direction, the speed of such steam vessel shall, if necessary, be slackened when it is within 30 yards of and until it shall have passed the sailing vessel or steam tug and towed vessels.

25. Sea-going steam vessels shall not be navigated in the port above the Low Lighthouse at a greater speed over the ground than six knots or seven statute miles per hour, whether going with or against the tide.

26. (*Vessels not to cause risk of collision.*)

27. (*Steamship unable to keep out of the way of sailing ship to*

(*d*) This means that a vessel coming in from sea must not cross the entrance close to the pier heads. *The Harvest*, 11 P. D. 14.

(*e*) These rules do not make a crossing vessel responsible, whatever the circumstances may be, if she comes in contact with another vessel which is on the side of the river prescribed for her navigation. A vessel may legitimately cross the river whenever it is reasonably safe to do so, and it is the duty of other vessels proceeding up or down the river to use the ordinary precautions for avoiding collision with her. *The Thetford*, 6 Asp. M. C. 179.

sound four blasts of two seconds' duration; then sailing ship to keep out of way.) Local rules (Tyne).

28. Every sailing or steam vessel overtaking any other vessel shall be kept out of the way of the overtaken vessel, which shall be kept on her course, and no obstruction shall be wilfully caused by the overtaken vessel to the passage of the overtaking vessel; and any vessel having passed another shall not cross the bows of the passed vessel until at such a distance as will not necessitate the stopping or easing of the passed vessel to avoid collision.

30. (*Scope of tow-line, except to eastward of Low Lighthouse, North Shields, not to exceed twenty fathoms.*)

31. (*Not more than one vessel exceeding* 200 *tons to be towed by same tug.*)

32. (*Length of train of vessels in tow not to exceed* 450 *feet from stern of tug; vessels not to be towed abreast; rafts not to exceed* 250 *feet by* 40 *feet.*)

33. (*Not more than six keels, wherries, or boats to be towed at once.*)

34. (*Two tugs towing same vessel not to be more than* 100 *feet apart, or, if towing abreast, more than* 40 *feet.*)

35. (*Vessels not to drift; off dock entrances vessels waiting admission to keep out of fairway.*)

37. (*Vessels to have anchor ready to let go.*)

39. Every vessel under way when overtaken by a fog shall be navigated at a very moderate speed, and shall, as soon as practicable, be moored or anchored out of the navigable channel. Vessels shall not, without the permission of the harbour-master, be got under way during a fog.

40. (*Engines to go dead slow* 100 *yards before reaching, and fifty yards after passing, diving and other craft of the Commissioners.*)

41. (*And within* 100 *yards of wreck-removing craft.*)

42. (*A red flag or red light to be shown on dredgers on side where chains are taut. Vessels to pass on other side.*)

43. (*Also where no passage between dredger and shore.*)

44. (*Vessels not to moor at Commissioners' white buoys.*)

47. (*Tug to attend vessel in tow till moored.*)

48. (*Engines not to move within fifty yards of boat coming alongside.*)

WATERFORD.

Waterford.

See *London Gazette* for 1886, Vol. II., p. 5447, for Bye-laws of 10th November, 1886.

A notice dated 16th November, 1886, issued by the Commissioners, states that there are no local rules regulating the passing or overtaking of one vessel by another in the port and harbour of Waterford.

The bye-laws apply to the river Suir from Granagh Castle to the Hook Lighthouse, including all the space between the junction of the Roes River with the river Suir and the Hook Lighthouse, and from Bilberry Rock to Swing Head, in the County of Waterford, including St. Katherine's, commonly called St. John's Pill. They are substantially identical with the bye-laws in force in the river Suir above Granagh Castle. The substance of the last-mentioned bye-laws is set out above (*f*).

(*f*) *Supra*, p. 572.

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